United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

JANUARY TERM, 1904.

No. 1413. 278

ELIZABETH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF PETER A. SMITH, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 8, 1904.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1904.

No. 1413.

ELIZABETH B. SMITH, ADMINISTRATRIX OF THE ESTATE OF PETER A. SMITH, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 14, 1904.

In the Court of Appeals of the District of Columbia.

ELIZABETH B. SMITH, Administratrix of the Estate of Peter A. Smith, Appellant,
vs.
THE DISTRICT OF COLUMBIA.
} No. 1413.

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a Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, Administratrix of the Estate of Peter A. Smith, Plaintiff,
vs.
GEORGETOWN & TENNALLYTOWN RAILWAY Company of the District of Columbia, a Corporation, and The District of Columbia, a Corporation, Defendants.
} No. 45257. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Memorandum.*

April 9, 1902.—Leave to plaintiff to file amended declaration.

Amended Declaration.

Filed April 9, 1902.

In the Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, as Administratrix of the Estate of Peter A. Smith, Plaintiff,
v.
GEORGETOWN & TENNALLYTOWN RAILWAY Company of the District of Columbia, a Corporation, and The District of Columbia, a Corporation, Defendants.
} At Law. No. 45257.

First count.

By leave of the court first had and obtained, the plaintiff files this her amended declaration as follows:

The plaintiff, Elizabeth B. Smith, to whom letters of administration have been issued and granted, by the supreme court of the District of Columbia, holding a probate court, upon the estate of Peter A. Smith, deceased, late of the District of Columbia, sues the defendants, The Georgetown & Tennallytown Railway Company, a corporation, doing business in the said District, and The District of Columbia, a municipal corporation, for that heretofore, to wit: on the 1st day of July, 1901, by an injury done and happening
2 within the limits of the District of Columbia, the death of the said Peter A. Smith was caused by the wrongful act, neglect and default of the said defendants, which said wrongful act, neglect and default was such as would, if the death of the said Peter A. Smith had not ensued, entitle him to maintain an action, and recover damages against the said defendants.

And whereas by an act of Congress, the said defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, was duly incorporated with authority to construct and lay down double or single tracks of railway along and upon High street (now otherwise known as Thirty-second street) and down said Thirty-second street, across N street and adjacent to the eastern terminus of Prospect avenue to or near the intersection of M street, northwest, in said District; and that pursuant to said act of incorporation and under the control and direction of the defendant, The District of Columbia, the said Georgetown and Tennallytown Railway Company of the District of Columbia, constructed a double line of tracks from M street along said Thirty-second street, adjacent to the eastern terminus of Prospect avenue and intersecting N street; thence northward along said Thirty-second street, which said double line of tracks was constructed, the inner rails of said tracks being

laid at a distance of three feet and seven inches apart, all of which was subject to the approval, control and direction of the defendant, The District of Columbia.

And plaintiff says that heretofore, to wit: on the 1st. day of July, 1901, and also for a long time prior thereto, said defendant, The Georgetown & Tennallytown Railway Company, was and still is a

3 common carrier for hire in the District of Columbia, and as such constructed, used, owned, operated, maintained and controlled a line of street railway in the District of Columbia, and owned and operated cars in said District, which were and are propelled along said tracks of railway by means of electricity.

And it then and there became, was and is the duty of the said defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, as such common carrier, to carefully construct and maintain its said parallel tracks, at a safe and proper distance from each other, and to otherwise construct the said tracks in a safe and proper manner, so as to avoid all possible danger to passengers lawfully in said defendant's cars while upon said tracks.

And the plaintiff says that by virtue of the said act of incorporation of the defendant, The Georgetown & Tennallytown Railway Company, as well as the general duties imposed by law upon the said defendant, The District of Columbia, it was at the time aforesaid, and still is, the duty of the said defendant, The District of Columbia, to require the said defendant, The Georgetown & Tennallytown Railway Company, to carefully, properly and safely construct its said line of tracks at a proper, safe and lawful distance from each other, so that cars passing each other on said parallel tracks might pass in a manner safe and secure to passengers: and it was the further duty of the said defendant, The District of Columbia, to require the said defendant, The Georgetown & Tennallytown Railway Company, to use and employ all reasonable and possible means and methods, so that all passengers riding on said cars might be free from danger.

And plaintiff says that on, to wit: the 1st day of July,

4 A. D., 1901, in the night time, between the hours of nine and ten o'clock the plaintiff's intestate, became and was a passenger on one of the cars of the said defendant The Georgetown & Tennallytown Railway Company, and paid the usual and customary charge for transportation; that he boarded one of said cars at said Thirty-second street near M street, northwest, which said car thereafter proceeded in a northerly direction along said Thirty-second street in said District.

And it then and there became and was the duty of the said defendant, The Georgetown & Tennallytown Railway Company, to safely carry plaintiff's intestate to his destination and to that end to construct and maintain safe and suitable tracks so that cars, while being operated thereon, might pass each other in a manner safe and secure to passengers; and it then and there became and was the duty of the said defendant, The District of Columbia, to require its

co-defendant, the said railway company, to provide all safe and suitable appliances in the construction of the tracks of said railway company on said Thirty-second street, northwest, at or near Prospect avenue, at such safe, proper and lawful distances from each other, so that all passengers riding in cars upon said tracks might be free from danger.

Yet the said defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, on to wit: the said 1st day of July 1901, on Thirty-second street, northwest, at or near Prospect avenue in the said District, notwithstanding its duty in the said premises, so negligently, improperly and in utter violation of its said duties, carelessly, negligently and improperly constructed
5 its said tracks on said Thirty-second street, northwest, near Prospect avenue, by placing the inner rails of said double or parallel tracks unlawfully, unnecessarily and dangerously close together, to wit: about the distance of three feet and seven inches, and maintained and used said tracks so improperly and negligently constructed.

And the said defendant, The District of Columbia, on to wit: the day and year last aforesaid, notwithstanding its duty in the said premises, so negligently, carelessly, unlawfully and improperly and in utter violation of the duties imposed upon it by law, knowingly, unlawfully, injuriously and negligently permitted and suffered the said defendant, The Georgetown & Tennallytown Railway Company, to carelessly and negligently construct its tracks on said Thirty-second street, northwest, near Prospect avenue, by placing the said inner rails of said double tracks dangerously and unnecessarily close together, as aforesaid, and knowingly, unlawfully, injuriously and negligently suffered and permitted the said railway company to maintain and use said tracks, as aforesaid, so improperly and negligently constructed, for a long space of time, about the period of, to wit: five years; that by reason of said neglect and default by the said defendants, their agents and employees, in said premises, on the day and year last aforesaid, on Thirty-second street, northwest, at or near Prospect avenue, while seated in an open car of the said defendant, The Georgetown & Tennallytown Railway Company, going in a northerly direction and without any fault or negligence whatsoever upon the part of the said intestate, and through and by reason of the wrongful act, neglect and default of the said defendants, their agents and employees, the said Peter A. Smith, plaintiff's intestate, was with great
6 force and violence, struck by one of the cars of the said defendant, The Georgetown & Tennallytown Railway Company, going south and passing the car in which plaintiff's intestate was seated; and said intestate was then and there violently thrown from his seat in said car and then and there became and was fatally injured; and the death of the said Peter A. Smith was caused by and did ensue from the said injuries then and there done and happening in the District aforesaid. And the said Peter A.

Smith, whose death was caused as aforesaid, left surviving him a widow and five children, two daughters and three sons, and by reason of the premises and the statute in such cases made and provided, an action for damages does accrue to the said plaintiff, to wit: in the sum of ten thousand dollars ($10,000) damages, therefore the plaintiff brings this suit.

And the plaintiff claims of the defendants, The District of Columbia and The Georgetown & Tennallytown Railway Company of the District of Columbia, the sum of ten thousand dollars ($10,000) besides the costs of this action.

Second count.

The plaintiff, Elizabeth B. Smith, to whom letters of administration have been issued and granted, by the supreme court of the District of Columbia, holding a probate court, upon the estate of Peter A. Smith, deceased, late of the District of Columbia, further sues the defendants, The Georgetown & Tennallytown Railway Company, a corporation, doing business in the said District, and The District of Columbia, a municipal corporation, for that heretofore, to wit: on the 1st day of July, 1901, by an injury done and happening within the limits of the District of Columbia, the death of the said Peter A. Smith was caused by the wrongful act, neglect
7 and default of the said defendants, which said wrongful act, neglect and default was such as would, if the death of the said Peter A. Smith had not ensued, entitle him to maintain an action, and recover damages against the said defendants.

And whereas by an act of Congress, the said defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, was duly incorporated with authority to construct and lay down double or single tracks of railway along and upon High street (now otherwise known as Thirty-second street) and down said Thirty-second street, across N street and adjacent to the eastern terminus of Prospect avenue to or near the intersection of N street, northwest, in said District; and that pursuant to said act of incorporation and under the control and direction of the defendant, The District of Columbia, the said Georgetown & Tennallytown Railway Company of the District of Columbia, constructed a double line of tracks from M street along said Thirty-second street, adjacent to the eastern terminus of Prospect avenue and intersecting N street; thence northward along said Thirty-second street, which said double line of tracks was constructed, the inner rails of said tracks being laid at a distance of three feet and seven inches apart, all of which was subject to the approval, control and direction of the defendant, The District of Columbia.

And plaintiff says that heretofore, to wit, on the 1st day of July 1901, and also for a long time prior thereto, said defendant, The Georgetown & Tennallytown Railway Company, was and still is a common carrier for hire in the District of Columbia, and as such

constructed, used, owned, operated, maintained and controlled
8 a line of street railway in the District of Columbia, and owned and operated cars in the said District, which were and are propelled along said tracks of railway by means of electricity.

And it then and there became and was and is the duty of the said defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, as such common carrier to operate safe and suitable cars upon its said parallel tracks on Thirty-second street, northwest, at or near Prospect avenue, with due regard to the public safety, so that said cars while passing in opposite directions along said parallel tracks might pass each other at a safe, proper and lawful distance.

And the plaintiff says that by virtue of the said act of incorporation of the defendant, The Georgetown & Tennallytown Railway Company, as well as the general duties imposed by law upon the said defendant, The District of Columbia, it was at the time aforesaid, and still is, the duty of the said defendant, The District of Columbia, to require the said defendant, The Georgetown & Tennallytown Railway Company, to operate safe and suitable cars upon said tracks with due regard to the public safety, so that all passengers riding in or upon said cars might be free from danger; and it was the further duty of the said defendant, The District of Columbia, to require the said defendant, The Georgetown & Tennallytown Railway Company, to use and employ all reasonable and possible means and methods, so that all passengers riding upon said cars might be free from danger.

And plaintiff says that on to wit: the 1st day of July, A. D.
9 1901, in the night time, between the hours of nine and ten o'clock, the plaintiff's intestate, became and was a passenger on one of the cars of the said defendant, The Georgetown & Tennallytown Railway Company, and paid the usual and customary charge for transportation; that he boarded one of said cars at said Thirty-second street near M street, northwest, which said car thereafter proceeded in a northerly direction along said Thirty-second street in said District.

And then and there it became and was the duty of the said defendant, The Georgetown & Tennallytown Railway Company, to safely carry plaintiff's intestate to his destination, and to that end, it was the duty of said last named defendant to select, use and operate suitable cars for its said tracks, and it became and was the duty of the said defendant, The District of Columbia, to require its co-defendant, the said railway company, to select, use and operate suitable cars for operation in said District of Columbia, so that said cars while passing in opposite directions upon said tracks, might pass each other at a safe, proper and lawful distance, and in a manner safe and secure to plaintiff's intestate.

Yet, the said defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, on to wit, the said 1st day of July 1901, on said Thirty-second street, at or near Prospect avenue, in

said District, notwithstanding its duty in the said premises, in utter violation of its said duties so carelessly, improperly and unlawfully managed, controlled, used and operated unsuitable, wide, open or summer cars upon its said tracks so that the said cars while passing each other in opposite directions along said parallel tracks, on Thirty-second street, northwest, at or near Prospect avenue, in said District, came within dangerous and unnecessary proximity to each other, to wit: the distance of about three inches, and the said defendant, The District of Columbia, knowingly, so carelessly, improperly, negligently and unlawfully suffered and permitted the said railway company to negligently carelessly, improperly and unlawfully manage, control, use and operate wide, open or summer cars, so large and unsuitable that said cars, while passing in opposite directions on said parallel tracks, came within dangerous and unnecessary proximity to each other, to wit; the distance of about three inches as aforesaid; that by reason of said neglect and default by the said defendants, their agents and employees in said premises, on the day and year last aforesaid, on Thirty-second street, northwest, at or near Prospect avenue, while seated in an open car of the said defendant, The Georgetown & Tennallytown Railway Company, going in a northerly direction and without any fault or negligence whatsoever upon the part of the said intestate, and through and by reason of the wrongful act, neglect and default of the said defendants, their agents and employees, the said Peter A. Smith, plaintiff's intestate was, with great force and violence, struck by one of the cars of the said defendant, The Georgetown & Tennallytown Railway Company, going south and passing the car in which plaintiff's intestate was seated; and said intestate was then and there violently thrown from his seat in said car and then and there became and was fatally injured; and the death of the said Peter A. Smith was caused by and did ensue from the said injuries then and there done and happening in the District aforesaid. And the said Peter A. Smith, whose death was caused as aforesaid, left surv-ing him a widow and five children, two daughters and three sons, and by reason of the premises and the statute in such cases made and provided, an action for damages does accrue to the said plaintiff, to wit: in the sum of ten thousand dollars ($10,000) damages, therefore the plaintiff brings this suit.

And the plaintiff claims of the defendants, The District of Columbia and The Georgetown & Tennallytown Railway Company of the District of Columbia, the sum of ten thousand dollars ($10,000) besides the costs of this action.

DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorneys for Plaintiffs.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the date of the service hereof; otherwise judgment.

DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorneys for Plaintiffs.

12 *Plea of Defendant The District of Columbia.*

Filed April 30, 1902.

In the Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, Adm'r of Estate of Peter A. Smith,
vs.
GEORGETOWN AND TENALLYTOWN RAILWAY Company and The District of Columbia.
} At Law. No. 45257.

The defendant, The District of Columbia, for plea to the plaintiff's amended declaration, filed herein, says it is not guilty in manner and form as alleged.

A. B. DUVALL,
E. H. THOMAS,
Attorneys for the Defendant The District of Columbia.

Plea to Amended Declaration.

Filed May 5, 1902.

In the Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, Adm'x,
vs.
GEORGETOWN & TENNALLYTOWN RAILWAY Company of the District of Columbia *et al.*
} At Law. No. 45257.

The defendant, The Georgetown and Tennallytown Railway Company of the District of Columbia, for plea to the amended
13 declaration filed in the above-entitled cause, says that it is not guilty as alleged.

J. J. DARLINGTON, *Attorney.*

Joinder in Issue with District of Columbia.

Filed May 9, 1902.

In the Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, as Adm'x,
vs.
GEORGETOWN & TENNALLYTOWN RY. CO. OF DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA. } At Law. No. 45257.

The plaintiff hereby joins issue with the defendant, The District of Columbia, upon its plea filed herein.

DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorneys for Plaintiff.

Joinder in Issue with Def't G. & T. Ry. Co. of D. C.

Filed May 9, 1902.

In the Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, as Adm'x,
vs.
GEORGETOWN & TENNALLYTOWN RAILWAY COMPANY OF THE DISTRICT OF COLUMBIA AND THE DISTRICT OF COLUMBIA. } At Law. No. 45257.

14 The plaintiff hereby joins issue with the defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, upon its plea filed herein.

DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorneys for Plaintiff.

Memorandum.

January 6, 1904.—Verdict for plaintiff *vs.* Georgetown & Tennallytown R. R. Co., and in favor of the District of Columbia.

Supreme Court of the District of Columbia.

TUESDAY, *January* 12, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

ELIZABETH B. SMITH, as Administratrix of the Estate of Peter A. Smith, Plaintiff,
vs.
GEORGETOWN & TENNALLYTOWN RAILWAY Company of the District of Columbia, a Corporation, and The District of Columbia, a Corporation, Defendant.
} At Law. No. 45257.

The time within which to move for a new trial against the defendant The District of Columbia, having expired, judgment on verdict in favor of said defendant is ordered: Therefore it is considered that the plaintiff take nothing by her suit against the District of Columbia, and that said defendant go thereof without day and recover against the plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

Supreme Court of the District of Columbia.

WEDNESDAY, *January* 13, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

ELIZABETH B. SMITH, Adm'x, Plaintiff,
vs.
GEORGETOWN & TENNALLYTOWN RY. CO. *et al.*, Defendants.
} At Law. No. 45257.

Now comes here the plaintiff by her attorney Mr. David and notes an appeal to the Court of Appeals from the judgment rendered in favor of the District of Columbia, and the penalty of the bond on said appeal is fixed in the sum of one hundred dollars.

16 Supreme Court of the District of Columbia.

FRIDAY, *January* 22, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

ELIZABETH B. SMITH, as Administratrix of the Estate of Peter A. Smith, Plaintiff,
vs.
THE GEORGETOWN AND TENNALLYTOWN Railway Company of the District of Columbia, a Corporation, and The District of Columbia, a Corporation, Defendants. } At Law. No. 45257.

Upon hearing the motion for a new trial filed herein by the Georgetown and Tennallytown Railway Company of the District of Columbia, it is considered that said motion be, and hereby is, overruled, and judgment against said defendant on verdict ordered: Therefore, it is considered that the plaintiff recover against the Georgetown and Tennallytown Railway Company of the District of Columbia the sum of nine thousand dollars ($9000) with interest thereon from this date, being the money payable by said defendant to the plaintiff by reason of the premises, together with her costs of suit to be taxed by the clerk, and have execution thereof.

The defendant, The Georgetown & Tennallytown Railway Company of the District of Columbia, notes an appeal to the Court of Appeals, and the boud on said appeal is fixed in the penalty of $200.00.

17 *Memorandum.*

January 25, 1904.—Plaintiff's bond on appeal filed.

Supreme Court of the District of Columbia.

FRIDAY, *February* 12, 1904.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

ELIZABETH B. SMITH, Administratrix, Plaintiff,
vs.
GEORGETOWN & TENNALLYTOWN RY. CO. *et al.*, Defendants.
} At Law. No. 45257.

Now comes here the plaintiff and prays the court to sign, seal, and make part of the record, now for then, *of* her bill of exceptions taken during the trial of this cause, which bill was heretofore submitted to the court, and the same is accordingly done.

Filed February 12, 1904.

In the Supreme Court of the District of Columbia.

ELIZABETH B. SMITH, as Administratrix of the Estate of Peter A. Smith, Plaintiff,
vs.
THE GEORGETOWN & TENNALLYTOWN RY. Company, a Corporation, and The District of Columbia, a Corporation, Defendants.
} At Law. No. 45257.

Be it remembered that at the trial of this case before Hon. Job Barnard, one of the justices of the supreme court of the District of Columbia, and a jury empannelled and sworn to try the issue between the plaintiff and the defendants, the plaintiff gave testimony tending to prove that she is the widow of Peter A. Smith, the plaintiff's intestate, and that her said husband, Peter A. Smith, died in the city of Washington, District of Columbia, on to wit, the 1st day of July, 1901; that at the time of his death the decedent, whose age was 48 years, was a strong, healthy, vigorous man, and that his occupation was that of a carpenter; that the said plaintiff's intestate left surviving him besides the plaintiff, his widow, five children whose names and ages are, James J. Smith, 19 years, Edward A. Smith, 15 years, George T. Smith, 9 years, Catherine Smith 12 years and J. B. Smith 3 years; that subsequent to the death of the said Peter A. Smith, the plaintiff was duly and regularly appointed the

administratrix of the estate of the said Peter A. Smith by the supreme court of the District of Columbia holding a probate court,
19 and that the said plaintiff duly qualified as such administratrix by giving bond in the sum required by the court, and that letters of administration were issued to her pursuant thereto; that for some years prior to the death of Peter A. Smith, he and his family resided in Tennallytown, D. C.; that in going to and from his home to his work in the city of Washington, the plaintiff's intestate sometimes rode on the cars of the Georgetown and Tenleytown Railway Company; that on several occasions prior to the death of Peter A. Smith, he and the plaintiff rode together on said cars; that the said plaintiff's intestate was earning at the time of his death from $15 to $18 per week.

That J. NOTA MCGILL, testified that on the evening of July 1st 1901, at about nine o'clock, he entered a north bound car of the Georgetown and Tenleytown Railway Company line at the corner of 32nd and M streets, going into the car at the front door and taking a seat, one or two, back of the middle—it might have been the middle of the car—on the west side. When the car was at the north side of 32nd and Prospect avenue a down going car—that is one going south—passed in close proximity to the car on which witness was riding and while the two cars were practically abreast of each other there was a swaying of the north bound car noticed as well as the south bound car; that at the same time there was considerable cries and consternation among the passengers, and there was a noise like something being crushed or forced between the cars; that the witness turned immediately, several having risen in their seats, and it was impossible to see the cause of the disturbance, but upon going to the rear of the car the witness noticed that the brass railing or
20 rod at the west side was bent outwardly some distance. Later, the south bound car returned and moved northwardly in the position in which the two cars were at the time of the accident, the witness measured the space between the brass railing or rods of the two cars and found that it was a fraction of an inch less than his pocket knife, which measured two and three-fourths inches. The witness further testified that the space between the two cars, that is to say, the north bound car in which the plaintiff's intestate was seated, and the south bound car, was about three inches. That the witness obtained a foot rule and measured the distance between the innermost rails of the tracks on 32nd street, near Prospect avenue, where the accident occurred, and found that to be three feet and seven inches, as he now remembers.

It further appeared by admissions of counsel for the defendants, that at the time of the construction of the tracks of the defendant The Tenleytown Railway Company, and for a long time thereafter, small cars were used, but that for a period of 6 or 8 months prior to the accident larger cars were used and the same cars as used at the time of the accident. That no change with reference to the size and

construction of the cars was made between the change above referred to and the date of the accident.

That the plaintiff offered further testimony tending to prove that the plaintiff's intestate boarded the car of the defendant The Georgetown and Tenleytown Railway Company going in a northerly direction on 32nd street at or about nine o'clock p. m., on the 1st day of July, 1901; that all of the cars used upon said track were
21 large summer cars with guard rails on each of said cars; used for the purpose of preventing passengers from alighting therefrom on the side adjacent parallel track; that plaintiff's intestate was seated upon the rear seat of the north bound car of the defendant railroad company on 32nd street and adjacent to the other parallel or south bound track; that as the car upon which the plaintiff's intestate was riding reached the point above Prospect avenue on 32nd street, a south bound car of similar size and construction and operated by the defendant company approached the car upon which the deceased was riding; that said cars in passing each other upon said parallel tracks and going in opposite directions, came in close proximity to each other and that in passing came within the distance hereinabove set forth, to wit, two and three-fourths inches; that while so passing the said Peter A. Smith had his elbow resting upon said guard rail; that while said cars were passing there was a swaying of cars which caused them to almost touch each other and that while passing the upright posts or other portions of the south bound car struck the elbow of the deceased dragging him over said guard rail between said passing cars and throwing him upon the street causing injuries which resulted in his death immediately.

That plaintiff offered in evidence sections 18, 19, 20, 21, 22, 23, and 24 of the police regulations of the District of Columbia, which were received, as follows:

"SEC. 18. Any railway company which shall operate any motor car in the District of Columbia, not fully equipped with fenders herein adopted or authorized shall be subject to a fine of $25 a day for each and every car not so equipped and operated by said company.

SEC. 19. No motorman or conductor shall operate or have
22. in charge any motor car in the District of Columbia that is not fully equipped with fenders of the kind herein adopted or authorized, and any motor man or conductor operating or being in charge of any such car not so equipped, shall on conviction thereof, be punished by a fine not to exceed $10.

SEC. 20. Every motor car operated in the District of Columbia must be so constructed or altered that a clear space of fifteen inches in height above the rails is provided between the wheel guard and the adjacent end of the car, in order to allow the effective action of the wheel guard.

SEC. 21. Any railway company failing to comply with the require-

ments of sec. 20 of this article shall be subject to a fine of $5. a day for each car not so equipped or altered and operated by it.

SEC. 22. Platforms of street-cars shall be guarded by gates of a construction and operation approved by the Commissioners of the District of Columbia, and any company failing to comply with the provisions of this section shall be fined not more than $40.

SEC. 23. The fenders must be kept in thorough working order and in good repair when in use. Any railway company failing to comply with this provision shall be subject to a fine of $20 a day for each and every offense.

SEC. 24. No street car shall move at a greater rate of speed than twelve miles an hour in the city of Washington, nor at a greater rate of speed than fifteen miles an hour outside of said city: Provided that this regulation shall not be construed as implying a right in any street railroad company to operate its cars at a rate of speed in excess of that fixed by its charter. Street-cars shall not
23 exceed a rate of speed greater than six miles an hour at street-crossings. When it is necessary for street-cars to stop at street-crossings they shall stop on the near side thereof; the front end of the car or train to rest on a line with the curb on the near side of the intersecting street, except where in the opinion of the Commissioners the mechanical appliances make it impracticable to do so: Provided that in cases where stops are allowed on both sides of a crossing, such stops may be continued if the railroad companies so desire, and that street cars running along the parking through the middle of Pennsylvania avenue, east of the Capitol shall be permitted to stop on the far side of the crossings of intersecting streets instead of the near side of such crossings."

And the plaintiff offered in evidence the following acts of Congress, which were received without *rejection*:

CHAP. 912. An act to incorporate the Georgetown and Tennallytown Railway Company of the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John W. Thompson, Richard H. Goldsborough, William J. Thompson, Henry H. Dodge, W. K. Ryan, Osceola C. Green, and Norval W. Burchell, of the District of Columbia, Arthur E. Bateman, T. W. Pearsall, and Harvey Durand, of the city and State of New York; and Nathaniel W. Bowe and John A. Coke, of the city of Richmond, State of Virginia, and their associates, successors and assigns, be, and they are hereby, created a body corporate under the name of the Georgetown and Tennallytown, Railway Company of the District of Columbia, with authority to construct and lay down a single or double track railway, with necessary switches, turn-outs,
24 and other mechanical devices for operating the same by cable or electric power for carrying passengers in the District of Columbia, from the Potomac river near High street, to, and along

High street in Georgetown to the Tennallytown road, but wholly outside of the limits of said road, and along the side of the said road to the District line; also the privilege of laying such conduits beneath the surface of Water street for the purpose of conveying or communicating power from any suitable point along said Water street to said High street, as may be found necessary, and subject to the approval of the Commissioners of the District of Columbia; *Provided, however*, That such conduits shall be laid so as not to impair the surface of said Water street for traffic and wagon travel. Whenever the foregoing route or routes may coincide with the duly authorized route or routes of other duly incorporated street railway companies in the District of Columbia, either or both companies may use the said track when necessary; and in such case they may use such tracks in common, upon such fair and equitable terms as may be agreed upon by said companies; and in the event said companies fail to agree upon equitable terms, either of said companies may apply by petition to the supreme court of the District of Columbia, which shall hear and determine the matter in due form of law, and adjudge to the proper party the amounts of compensation to be paid therefor. Said corporation is authorized and empowered to propel its cars on such other lines as it shall coincide with by cable power or such other motive power as it is authorized to use to propel its own cars over the routes prescribed in this act, and may repair and construct such portion of its road as may be upon the line or route, or routes of any other road thus used; and in case of any disagreement regarding such construction or repairs with any company whose line is thus used, such disagreement may be heard and determined summarily upon the application of either road to any court in said District having common-law jurisdiction. Said company shall receive a rate of fare not exceeding five cents for each passenger for any distance between the termini of said railway, and shall sell tickets in packages six for twenty-five cents. Said railway shall be constructed of good materials and in a substantial manner, with rails of the most approved pattern, the gage to correspond with that of other city railroads, all to be approved by the Commissioners of the District of Columbia. The tracks of said railway, the space between the tracks, and two feet beyond the outer rails thereof, where the streets are now paved, or shall hereafter be paved, which this franchise is intended to cover, shall be at all times kept by said corporation well paved and in good order, and on streets and roads not paved said corporation shall keep said tracks and the space between them in good repair, at its own expense, and subject to the approval of the District Commissioners. It shall be lawful for said corporation, its successors, or assigns, to make all needful and convenient trenches and excavations in any street or places where said corporation may be authorized to construct and operate its roads, and to place in such trenches and excavations all the needful and convenient devices and machinery for operating said railroad in

the manner and by the means aforesaid. It shall also be lawful for said corporation, its successors, or assigns, to erect and maintain, at such convenient and suitable points along the line as may seem most desirable to the board of directors of said corpora-
26 tion, and subject to the approval of the Commissioners of the District, and engine house or houses, boiler-house, and other buildings necessary for the successful operation of such cable or electric railroad. The rate of speed on said road shall not exceed twelve miles an hour, under a penalty of fifty dollars, recoverable by the Commissioners of the District by suit in any court of competent jurisdiction in the District of Columbia. Said company, shall on or before the fifteenth day of January of each year, make a report to Congress of the names of all the stockholders therein and the amount of stock held by each, together with a detailed statement of the receipts and expenditures, from whatever source and whatever account, for the preceding year ending December the thirty-first, which report shall be verified by affidavit of the president and secretary of said company; and said company shall pay to the District of Columbia, in lieu of personal taxes for the next ensuing year four per centum of its gross earnings upon traffic for the preceding year as shown by said verified statement, which amount shall be payable to the collector of taxes at the times and in the manner that other taxes are payable, and subject to the same penalties on arrears; and the franchise and property of said company, both real and personal, to a sufficient amount may be seized and sold in satisfaction thereof, as may be provided by law for the sale of other property for taxes; and said per centum of its gross earnings shall be in lieu of all other assessments of personal taxes upon its property used solely and exclusively in the operation and management of said railway.

SEC. 2. That the capital stock of said company shall be two hundred thousand dollars in shares of fifty dollars each. Said company shall require the subscribers to the capital stock to
27 pay in cash to the treasurer appointed by the corporators the amounts severally subscribed, as follows, namely: Ten per centum at the time of subscribing, and the balance of such subscriptions to be paid at such times and in such amounts as the board of directors may require, and no subscription shall be deemed valid unless the ten per centum thereof shall be paid at time of subscribing, as hereinbefore provided; and if any stockholder shall refuse or neglect to pay any installments as aforesaid, or as required by a resolution of the board of directors, the board of directors may sell at public auction, to the highest bidder, so many shares of his said stock as shall pay said installment (and the highest bidder shall be taken to be the person who offers to purchase the least number of shares for the assessment due), under such general regulations as may be adopted in the by-laws of said company; but no stock shall be sold for less than the total assessments due and payable; or said corporation may sue and collect the same from any delinquent subscriber, in any

court of competent jurisdiction. The said company shall place first-class cars on said railways, with all modern improvements for the convenience and comfort of passengers, and shall run cars thereon as often as the public convenience may require. And according to a published schedule to be filed with the District Commissioners, and be approved by them. The said company may buy, lease, or construct passenger rooms, ticket offices, workshops, depots, and buildings as they may deem necessary at such points along its line as may be approved by the Commissioners of the District, and as the business of the railway and the convenience of the public may require. Whenever one-half of the said whole capital stock of said company so subscribed, as aforesaid, shall have been paid
28 in, the said corporation shall have the right to issue bonds to an amount equal to half the stock subscribed, to be secured by mortgage of its franchise and property, real and personal; *Provided*, That no larger amount of stock and bonds shall be issued than the actual cost of the construction and equipment of the road: *Provided*, That the moneys raised on said bonds shall be used and expended for the improvement and completion of the said road, and not for the purpose of repaying the said corporation for the moneys expended by it on said road. Within thirty days after the passage of this act the corporators named in the first section, or a majority of them, or if any refuse or neglect to act, then a majority of the remainder, shall cause books of subscription to the capital stock of said company to be opened and kept opened, in some convenient and accessible place in the District of Columbia from nine o'clock in the forenoon until five o'clock in the afternoon, for a period to be fixed by said corporators not less than two days (unless the whole stock shall be sooner subscribed for); and said corporators shall give public notice by advertisement in one or more of the daily papers published in the city of Washington, of the time when and the place where said books shall be opened; and subscribers upon said books to the capital stock of the company shall be held to be stockholders; *Provided*, That every subscriber shall pay at the time of subscribing, ten per centum of the amount by him subscribed to the treasurer appointed by the corporators, or his subscription shall be null and void: *Provided further*, That nothing shall be received in payment of the ten per centum at the time of subscribing, except lawful money or certified checks from any established national banking house. And when the books of subscription
29 to the capital stock of said company shall be closed, the corporators and in case any of them refuse or neglect to act, then a majority of the remainder, shall, within twenty days thereafter, call the first meeting of the stockholders of said company, to meet within ten days thereafter, for the choice of directors of which meeting notice shall be given in a public newspaper published daily in the city of Washington, and by written personal notice to be mailed to the address of each stockholder by the clerk of the corporation;

and in all meetings of the stockholders each share shall entitle the holder to one vote, to be given in person or by proxy.

SEC. 3. That the government and direction of the affairs of the company shall be vested in the board of directors, nine in number, who shall be stockholders of record, and who shall hold their office for one year and until others are duly elected and qualified to take their places as directors; and the said directors (a majority of whom shall be a quorum) shall elect one of their number to be president of the company; and they shall also choose a vice-president, a secretary, and a treasurer, who shall give a bond, with surety, to said company, in such sum as the said directors may require for the faithful discharge of his trust. In the case of a vacancy in the board of directors by the death, resignation, or otherwise of any director, the vacancy occasioned thereby shall be filled by the remaining directors. The directors shall have power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and effects of the company, not contrary to the charter or to the laws of the United States and the ordinances
30 of the District of Columbia. There shall be an annual meeting of the stockholders for choice of directors, to be held at such time and place, under such conditions, and upon such notice as the said company in their by-laws may prescribe; and said directors shall annually make a report in writing of their doings to the stockholders and to the Commissioners of the District of Columbia. Said company shall have at all times the free and uninterrupted use of the railway, and if any person or persons shall wilfully or mischievously, unnecessarily obstruct or impede the passage of the cars of said railway with a vehicle or vehicles, or otherwise, or in any manner molest or interfere with passengers or operatives while in transit, or destroy or injure the cars of said railway, or depots, stations, or other property belonging to said railway, the person or persons so offended shall forfeit and pay for each offense not less than twenty five nor more than one hundred dollars to said company, to be recovered as other fines and penalties of said District and shall remain liable, in addition to said penalty, for any loss or damage occasioned by his or her or their acts as aforesaid. No person shall be prohibited the right to travel on the cars of said road or ejected therefrom by the company's employees for any other cause than of being drunk, disorderly, or contagiously diseased, or for the use of obscene or profane language, refusing to pay the legal fare exacted, or to comply with the lawful general regulations of the company. The said Georgetown & Tennallytown Railway Company shall have the right of way across such other railways as are now in operation within the limits of the lines granted by this act, and is hereby authorized to construct its said road across
31 such other railways: *Provided*, That it shall not interrupt the travel of such other railways in such construction. The

principal office of said company shall always be situated in the city of Washington, and all books and papers relating to the business of said company shall be kept thereat, and open at all times to the inspection of the stockholders. The meeting of the stockholders and directors shall be held at said office. The book in which transfers of stock shall be recorded shall be closed for the purpose of such transfer thirty days before the annual election.

SEC. 4. That the said work shall commence within one year from the passage of this act, and be completed its entire distance, with switches and turn outs, and with cars running thereon for the accommodation of passengers, within two years from the date of the passage of this act; otherwise this charter shall be null and void.

SEC. 5. That Congress hereby reserves to itself the right to at any time alter, amend or repeal this act.

Received by the President August 10, 1888.

(NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.)

CHAP. 48. An act to amend an act to incorporate the Georgetown and Tennallytown Railway Company of the District of Columbia, which became a law August 10, anno Domini 1888.

32 *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act entitled "An act to incorporate the Georgetown and Tennallytown Railway Company of the District of Columbia" be, and the same hereby is, amended, by substituting after the words "and along High street in Georgetown, to the Tennallytown road" the words "and thence along and in said roads" for the words "but wholly outside of the limits of said road and along the side of said road;" *Provided,* That the inner line of rails shall be at the minimum distance of eight feet from the center of the improved roadway: *And provided further,* That said railway shall be located on such side of the road way as may be indicated by the Commissioners of the District of Columbia.

Approved March 24, 1890.

And the court took judicial notice of the following provision in the act of Congress approved July 14, 1892, being the District appropriation bill for 1893, viz:

"Provided, that the streets and avenues shall be completed in the order in which they appear in said schedule, except High street, so far as the amount of money herein appropriated shall suffice for the work, and one-half of the cost of widening High street

named in the Georgetown schedule shall be charged to the Georgetown and Tennallytown Railway Company of the District of Columbia and collected from said company in the same manner as the cost of laying down pavements, sewers, and other work, or repairing the same, lying between the exterior rails of the tracks of street railways, and for a distance of two feet from and exterior to
33 such track or tracks on each side thereof, are collectible under the provisions of section five of the act entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11th, 1887; and the act of August 22, 1888, entitled 'An act to incorporate the Georgetown and Tennallytown Railway Company of the District of Columbia,' is hereby altered and amended so as to authorize and require such charge and collection."

The foregoing was all of the testimony offered and submitted in behalf of said plaintiff; and the defendant, The District of Columbia moved the court to direct the jury to render a verdict for the said defendant, The District of Columbia; and thereupon the court granted the said motion and instructed the jury to render its verdict for the said District of Columbia; to which said instruction and direction, the plaintiff, by her attorneys then and there duly excepted and said exception was noted by the justice presiding on his minutes before the jury rendered its said verdict in favor of the said defendant, The District of Columbia, as directed by the court.

And, because the matters and things hereinbefore recited are not matters of record, and because the plaintiff desires to present her exceptions to the Court of Appeals of the District of Columbia, she moves the court to sign this, her bill of exceptions; which motion is by the court granted, and the plaintiff requests the justice presiding at the trial to sign this her bill of exceptions and make the same a part of the record according to the statute in such case made and provided, and it is accordingly done, now for then, this 12th day of February, 1904.

JOB BARNARD, *Justice.*

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 33, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 45,257, at law, wherein Elizabeth B. Smith, administratrix, is plaintiff, and The Georgetown & Tennallytown Railway Company of the District of Columbia, a corporation, *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 8th day of March, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1413. Elizabeth B. Smith, administratrix of the estate of Peter A. Smith, appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Mar. 8, 1904. Henry W. Hodges, clerk.

Henry W. Bodger
Clerk

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1413.

ELIZABETH P. SMITH, ADMINISTRATRIX OF THE ESTATE OF PETER A. SMITH, DECEASED, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

DOUGLASS & DOUGLASS,
LEVI H. DAVID,
Attorneys for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1413.

ELIZABETH P. SMITH, ADMINISTRATRIX OF THE ESTATE OF PETER A. SMITH, DECEASED, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

STATEMENT OF FACTS.

This was an action brought by the plaintiff as administratrix of the estate of Peter A. Smith, deceased, against the Georgetown and Tennallytown Railway Company of the District of Columbia, a corporation, and the District of Columbia. As the record will show, the plaintiff's intestate was seated in a north-bound car of the defendant railway company at or about the hour of 9 o'clock p. m., on, to wit, the 1st day of July, 1901 (R., 3); that when said car approached the intersection of Thirty-second street and Prospect avenue, in the city of Washington, District of Columbia, another car of the defendant railway company, moving south on a parallel track, struck the arm of the plaintiff's intestate, breaking the same and dragging his

body out of the car and precipitating it upon the street, causing the injuries which resulted in his death a short time subsequent to the accident. The railway tracks of the defendant company were constructed under and by virtue of the authority contained in an act of Congress approved August 12, 1888 (R., 12). According to said act said railway tracks were to be constructed subject to the approval of the Commissioners of the District of Columbia; that at the point of the accident the distance between the inner rails of said parallel tracks was 3 feet 7 inches; that from the time of the construction of the track until about eight months prior to the date of the accident small cars were used thereon; that about six or eight months before the accident these cars were replaced by larger cars (R., 13), which in passing each other at the point of the accident and various other points along said track came within a distance of about two and one-half inches of each other (R., 13); that the plaintiff's intestate boarded the car upon which he was riding at the time of the accident several blocks south therefrom, and took a seat on the west side of the north-bound car; that he rested his arm, or elbow, upon the rod or guard-rail which extended from the front to the rear of the car and along the side of the car adjacent to the other track, and used for the purpose of preventing passengers alighting from the car on the side contiguous or adjacent to the other parallel track. While in this position the south-bound car approached, and while passing struck the elbow of the plaintiff's intestate, causing the accident above described; that at the point of the accident the streets were frequently used by the public, and that by ordinary observation the closeness of the tracks to each other and the size of the cars used thereon and their proximity in passing could be seen by casual observance; that no change had been made in the parallel tracks since their original construction in 1888.

At the conclusion of the testimony of the plaintiff the defendant, The District of Columbia, by its counsel, moved the

court to direct the jury to return a verdict in its favor; which motion the court granted, the plaintiff duly excepting thereto; and the jury accordingly rendered its verdict in favor of the said District of Columbia and judgment was entered thereon.

ASSIGNMENT OF ERRORS.

It is contended by the appellant that the court erred in directing the jury to find a verdict for the defendant, The District of Columbia, upon the following grounds:

1. That the court erred in holding as a matter of law that the Commissioners of the District of Columbia have no power to supervise and control the size and character of the cars to be operated by the defendant railway company upon the tracks constructed and used in the public streets of the city of Washington.

2. That the court erred in holding that even if the act of Congress authorizing the construction of said railway tracks and the selection and operation of the cars to be used thereon conferred upon the Commissioners of the District of Columbia the *power* to supervise such construction and selection and operation of the cars, such power imposed no *duty* to exercise the same.

3. That the court erred in refusing to hold that it was the *duty* of the District of Columbia to supervise the construction and maintenance of the tracks of said railway company and the selection and operation of the cars used thereon.

I.

ARGUMENT.

The points involved in this appeal are:

(*a.*) Did the Commissioners of the District of Columbia have a *general* power to regulate the distance between the parallel tracks of the defendant railway company and the size of the cars operated thereon?

(*b.*) Did the District Commissioners have the power to exercise such a supervision under, and pursuant to, the act of Congress incorporating the defendant railway company and amendatory acts thereto; and if such power was vested in the District Commissioners, was the same *permissive or mandatory?*

(*c.*) Are the District Commissioners vested with the *general* power to regulate the manner of the construction of railway tracks in the streets of the city of Washington, and to regulate the size, construction, and operation of the cars used thereon; and, if so, does this authority impose upon the District Commissioners the *duty* to exercise such authority for the public safety?

In discussing these propositions it may be well to first dispose of the primary question as to whether or not a *power* vested in a municipal corporation, in a case like this, imposes upon the municipality a *duty* to *exercise* such power. In other words, is this authority *permissive* or *mandatory?* The trial judge in the court below held that the power vested in the District of Columbia to control the manner of the construction and maintenance of the railway tracks, as well as the selection and operation of the cars used thereon,

was merely permissive; that such a power did not impose upon the municipality the *duty* to exercise the same, and that a failure to exercise such power thus delegated would not render the municipality liable. It is contended by the appellant that where authority is given to a municipality to do certain acts which involve the *rights* of the public or the protection of a private citizen, that the mere delegation of such power carries with it the *duty* to exercise it, and that a failure in this regard is a basis for a cause of action. To put it differently, the word "may" in a statute of this sort will be construed "shall."

In the case of The Board of Supervisors of Rock Island County *vs.* U. S., 4th Wallace, 435, the question was raised as to the construction of an Illinois statute which gave *authority* to the supervisors of Rock Island county to sell for delinquent taxes such portions of private property as might be necessary for the purpose of discharging unpaid taxes. In that case the question was raised as to whether this statute only gave the supervisors the *power*, or whether it imposed a *duty* to exercise such power where the rights of the taxpayers were involved. Mr. Justice Swayne, speaking for the court, said:

"The conclusion to be deduced from the authorities is, that where *power* is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or the individual rights called for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires *shall* be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is a test, was not to devolve a mere discretion, but to impose a 'positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion, judi-

cial in its nature, which courts cannot control, is too obvious to require remark. This case clearly does not fall within the latter category."

Under the authority above quoted it is contended that, the District of Columbia having control of the public streets and being vested with the power to control the operation of vehicles in the public highways for the public safety, it was its *duty* in this case to do so; and a failure to exercise such power is negligence, which carries with it liability for the consequences. It would be a travesty upon justice to hold that a public official paid out of public funds and vested with authority to perform certain acts for public protection charges such official with no *duty* to exercise such authority.

In the case of City of Baltimore *vs.* Marriott, 9th Md., 174, it appeared that the city of Baltimore, among other things, had the power to enact and pass laws and ordinances necessary to preserve the health of the city and prevent and remove nuisances. The court said:

"It is a well-settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary but imperative, and the power and authority in such cases may be considered *duty* and *obligation*."

At page 175 the court said:

"In order that the city should relieve itself from this obligation it was not only necessary that it should pass ordinances sufficient to meet the exigencies of the case, but it was also bound to see that these ordinances were enforced. To pass an ordinance and not enforce it would be the same as if none had been passed so far as the public interests were concerned."

See also Cochrane *vs.* Frostburg, 81 Md., 54.

II.

If it be conceded that a power vested in a municipality in a case like this carries with it a duty to exercise power, the next question arising is: Did the District Commissioners have the authority to supervise and to control the construction of the tracks of the defendant railway company, and also the selection and operation of the cars? The question as to whether or not they had *general* or *specific* powers may be more conveniently discussed together.

Under the provisions of the act of incorporation of the defendant railway company (R., 16), it is provided:

"Said railway shall be constructed of good materials and in a substantial manner with rails of the most approved pattern, the gauge to correspond with that of other city railroads, all to be approved by the Commissioners of the District of Columbia."

It is also provided by said act (R., 15):

"And they are hereby created a body corporate under the name of the Georgetown and Tennallytown Railway Company of the District of Columbia, with authority to construct and lay down a single or double track railway with necessary switches, turnouts and other mechanical devices for operating the same by cable or electric power for carrying passengers in the District of Columbia from the Potomac river near High street to and along High street in Georgetown to the Tennallytown road, but wholly outside of the limits of said road and along the side of said road to the District line; also the privilege of laying such conduits beneath the surface of Water street for the purpose of conveying communicating power from any single point along said Water street to said High street as may be found necessary *and subject to the approval of the Commissioners of the District of Columbia.*" (Italics ours.)

11th Appeal Cases D. C., 537:

In this case suit was brought by one Sullivan against the District of Columbia for permitting and allowing the Tennallytown Railroad Company to construct its tracks in an unsafe and improper manner along the Tennallytown road. Among other things, it was alleged in the declaration as follows:

"It is alleged in the declaration that the Georgetown and Tennallytown Railway Company, incorporated by an act of Congress which went into effect August 22, 1888, and amendment thereto, approved March 24, 1890, was permitted by said act of incorporation by and with the consent of the defendant, duly had and obtained, to run and operate its line of railway along and in the highway or public street known as the Tennallytown road, and that said railway company, under the authority aforesaid, and with the consent of the defendant, made and operated their railway in the highway at the point where the accident occurred. That the railway company had constructed their railway, as aforesaid, and while they were running and operating the same, the defendant, acting through its Commissioners and officers, built and constructed a wooden sidewalk about three feet in width along and by the side of the track of said railway, and in such close proximity thereto that the cars of said company, while being run on said railway, projected over and upon the sidewalk for a distance of from one to two feet at the place where the accident happened. That the plaintiff, while passing along and over the sidewalk, and while in the exercise of due and proper care and caution, was run into, upon and against by the cars of the said Georgetown and Tennallytown Railway Company, while running at rapid speed; by means whereof the plaintiff was thrown down upon the sidewalk, etc., whereby he sustained serious injuries.

"By the act of Congress incorporating the Georgetown and Tennallytown Railway Co., the company was clothed 'with authority to construct and lay down a single or double track railway, with necessary switches, turnouts and other mechanical devices for operating the same by cable or electrical power, for carrying passengers in the District of Columbia, from the Potomac river near High street, to and

along High street in Georgetown to the Tennallytown road, but *wholly outside of the limits of said road*, and along the side of the said road to the District line. * * * Said railway shall be constructed of good materials and in a substantial manner with rails of the most approved pattern, the gauge to correspond with that of other city railroads;' *all to be approved* by the Commissioners of the District of Columbia. By the amendatory act of Congress of March 24, 1890, it was provided that the act incorporating the Georgetown and Tennallytown Railway Company should be amended by substituting after the words 'and along High street in Georgetown to the Tennallytown road,' the words '*and thence along and in said road*,' for the words 'but wholly outside of the limits of said road and along the side of said road:' Provided that the inner line of rails shall be at the *minimum* distance of eight feet from the center of the improved roadway; and further, that said railway shall be located on such side of the roadway as may be indicated by the Commissioners of the District of Columbia."

"It is alleged and shown in proof that the railway track was laid, and the road was in operation, *before* the sidewalk was constructed; and we must assume that the railway was laid and constructed in accordance with the authority derived from Congress and the approval of the Commissioners of the District of Columbia. There is no evidence in the case to show the contrary. It is shown that the sidewalk, constructed after the railroad was made and in operation, was from three to four feet wide, and that, at the place where the accident occurred, the side of the car, or the running-board thereof, projected over the edge of the sidewalk some five and three-fourths inches. There is no dispute as to the fact that the plaintiff was struck by the projecting part of the car over the edge of the sidewalk, and was injured thereby."

"On the part of the plaintiff it is contended that the accident was attributable to the negligence of the defendant by its officers and agents, in constructing the sidewalk so near to the railroad track as to render passage on the sidewalk dangerous to those who did not know and have in mind the exact relation or distance between the running cars and the outer edge of the sidewalk. While on the part of the defendant it is contended that the principle of remote cause applies, and that, as the proximate cause of the accident was

the act of the railway company in running against the plaintiff while passing on the sidewalk, and thereby causing the injury, the railway company, and not the defendant, is liable."

In considering this proposition the court says:

"The District of Columbia as a municipal corporation, and the Commissioners of the District of Columbia, representing that corporation, have the care and charge of, and the exclusive jurisdiction over, all the public roads and bridges outside of the limits of Washington and Georgetown, as well as the care and control of the streets and avenues of the city. * * * And it is held by express and repeated decisions of the Supreme Court of the United States that the municipal corporation of the District is liable for injuries to persons arising from the negligence of its officers and agents in constructing and maintaining in safe condition for the use of the public, the streets, avenues, alleys, public roads and bridges and all public sidewalks of the city of Washington and the District of Columbia."

In the case of the B. and O. Railroad *vs.* District of Columbia, 10th Appeals D. C., 111, it is held that the joint resolution of Congress of February 26, 1892, authorizing the Commissioners of the District of Columbia to make and enforce all such reasonable and usual police regulations in addition to those already made under the act of January 26, 1887, as they might deem necessary for the protection of the lives, limbs, health, comfort, and quiet of the persons and the protection of all property within the District, gave the Commissioners power to make regulations governing the movement of railway locomotives and trains within the District; and that police regulations requiring steam railroads to be stopped before crossing other railroads operated by steam, cable and electricity are not in themselves unreasonable.

At page 127 the court said:

"The use of all property, more especially that situated or used in the public streets, is subject to the exercise of the power of reasonable police supervision and regulation, for the protection of the public health and safety. And what

may, and what may not, be a reasonable requirement in one case, cannot be determined by a fixed rule applicable alike to all; but must, of necessity, depend upon special circumstances and the exigencies of the situation, to meet which the regulation may have been adopted. Every such regulation may be, and often is, inconvenient, burdensome, and oppressive in a certain sense; but it does not follow that, by reason of such consequences alone it must be declared beyond the power and discretion of the legislative authority. To compel the appellants to stop their trains at the crossings, as required by the regulation in question, will cause them inconvenience, and, no doubt, work irksome delays in the passage of their trains through the city of Washington; but these requirements do not appear to be so oppressive, necessarily, as to require them to be declared unreasonable when considered in connection with the *paramount duty with which the Commissioners are charged* in respect of the protection of the lives and property of the people who are also entitled to the use of the streets, subject only to similar restrictions."

In this case it will be noted that the court held that it was within the power of the District Commissioners to prevent a steam railroad from crossing an electric line in the city of Washington, without first stopping its train, and the regulations do not require that the steam railway trains should stop at each crossing, but only at crossings where the steam cars came in contact with the electric cars. This was for the manifest purpose of protecting passengers upon the electric as well as steam cars from danger of collision. The court held that the District Commissioners had such power, and that it was its *paramount duty to exercise the same.*

In Hurforth *vs.* Corporation of Washington, 6 D. C. Reports, 288, it is held:

"That a municipality is liable for the negligence of a licensee under its authority when the municipality has notice of such negligence."

In the case of Cochrane *vs.* The Mayor of the City of Frostberg, 81 Md., 54, the city of Frostberg was authorized by its charter to pass and enforce ordinances to remove nuisances from this city as well as regulations necessary

for the peace, good order and safety of the city. In an action against the municipality the declaration alleged that the defendant permitted large numbers of horses and cattle to run at large upon the streets and had failed to pass any ordinances to remove such nuisance and source of danger; and that while the plaintiff was walking in a street of the said city she was struck and trampled upon by a cow which was running at large, and greatly injured. The court held that under its charter the defendant had the power to prevent cattle from running at large within the corporate limits, and that it was its duty to do so if the allegations of the declaration be true. That the defendant would ~~not~~ be held liable if it *could* have prevented this animal from running at large by the exercise of ordinary care.

In the case of Louisville Railroad *vs.* The City of Louisville, 8 Bush. (Ky.), 416, it is held that where the legislature conferred upon the city council the power to make a contract for the construction of a railway line in the streets of Louisville, that it was no defense that the city council had granted to the railway company by contract any privileges which would limit the powers of the city council for the protection of public rights. In that case it was held that the council may make a contract as an individual, but their legislative enactments must of necessity have the effect upon their individual contracts as well as upon those of persons artificially or naturally or of the general public. * * * The city cannot refuse to exercise its power to regulate and control its streets and highways when public interest or convenience demands that it shall be done.

The court in commenting upon the case, at page 422, said:

"The city government has the general power to so regulate the use and the enjoyment of private property in the city as to prevent its proving pernicious to citizens generally. It may, when the use to which the owner devotes his property becomes a nuisance, compel him to cease so to use it and punish him for refusing to obey its ordinances or regulations concerning such use (Ashbrooke *vs.* Commonwealth, 1 Bush. (Ky.), 139). These powers to interfere with the citizen in the use and enjoyment of his property are indispensable to the government. Without them the public

would be at the mercy of every man who would choose to disregard the safety or comfort of his neighbors. If it be a fundamental principle that these powers are impliedly reserved by the government in all of its grants of property to private individuals, its right to exercise such power cannot be doubted, whereas in a case like this the reservation is expressed."

A municipal corporation, by virtue of its police authority and power over its streets, may enact an ordinance to prohibit cars from obstructing the crossing of its streets; and the court expressed the opinion that trains could be so made up, and the road so operated, as to make it unnecessary to block up the streets. Ill. Central R. R. Co. *vs.* Galena, 40 Ill., 344.

In Dillon on Corporations, 4th ed., sec. 713, it is said:

"Resulting from the power over streets, and to protect the safety of citizens and their property, municipal corporations, in the absence of legislative restrictions, may control the mode of propelling cars within their limits, may prohibit the use of steam power, and regulate the rate of speed (Donnaker *vs.* State, 8 Sm. & Mar. (16 Miss.), 649; Redfield on Railways, 6th ed., 226; Richmond F. & Pot. R. R. Co. *vs.* Richmond, 96 U. S., 521).

In the case of City of Denver *vs.* Sherrett, 31 C. C. A., 500, the action was brought in the circuit court for the district of Colorado by the defendant in error against the City of Denver and the Denver Consolidated Electric Company to recover damages for personal injuries caused by the falling of an electric-light pole to which were attached the wires which supported the lamp used in lighting the city streets. The court said:

"Upon the merits of the case, it appeared from the evidence that the Denver Consolidated Electric Company under an ordinance of the city of Denver, had obtained the authority to place in the city streets the poles and wires necessary to enable it to furnish electricity for lighting purposes; that in pursuance of this authority, it had main-

tained at the intersection of Seventeenth and Stout streets a pole and wires, and also a lamp attached to wires, for the purpose of lighting the street; that on the 22d day of June, 1897, this pole fell down, carrying with it the wires attached thereto, which struck the plaintiff, who was then crossing the street, and severely injured her. The plaintiff further introduced evidence tending to show that the pole had been erected for a number of years; that it had become rotten in the part subjected to the dampness of the earth, which condition could have been readily discovered by proper examination of the pole; and it was claimed on behalf of plaintiff that both defendants had been guilty of negligence in thus allowing the pole to remain in the street after it had become rotten. Both the city and the electric company are joined as defendants to the action."

At page 505 the court says:

"The trial court charged the jury that, if the city was liable in this case, it was by reason of its omission in the matter of inspection. But it is apparent that inspection is merely a means to an end, and if the city was under obligation to inspect, it is because the city was under obligation to maintain the pole in a safe condition; and that this was the meaning of the court in its charge is clear from the statement." * * *

"Any corporation, municipal or otherwise, or any person that may be the owner of an electric light and power plant, is under obligation to use ordinary care in the maintenance and operation thereof, in order to prevent injury to third parties; but it cannot be true that, simply because a municipal corporation permits another to erect and operate such a plant in the city streets, it becomes charged with the duty of maintaining the poles, wires, and lamps connected therewith in a safe condition."

"A city by authorizing the erection by an electric light company of poles and wires in the streets, does not become chargeable with the duty of inspecting such structures, and maintaining them in a safe condition for the protection of persons using the streets for travel, to the same extent as though it had itself erected them; but its duty extends only to a general supervision over the light company, and it is liable for injuries caused by defects, only when it has been negligent, after actual or constructive notice of such defects."

In "Redfield on the Law of Railways" it is said:

"It has been held that a statute giving power to the common council to regulate the running of cars within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city.

"(*a.*) And a charter giving the trustees of a town supervision of streets and power to define and prevent or abate nuisances, justifies an ordinance prohibiting the use of steam as a motor in the streets, there being no legislative grant authorizing such use (N. C. C. Ry. Co. *v.* Lake View, 105 Ill., 207). But though in a general way a city has power to regulate the use of its streets, the legislature may authorize the construction of a railway therein, even though the city oppose it."

Harrisburg *vs.* Ry. Co., 1 Pearson, 298.

"Where however a city has full power by ordinance over its streets, a company accepting a charter with knowledge thereof, takes subject to a proper exercise of such power by the city.

W. P. Ry. Co. *vs.* Phila., 10 Phila., 70."

In the light of the authorities above quoted, it is contended that the District Commissioners had plenary power to supervise the construction of the tracks of the railway company and the selection and operation of the cars thereon, and that this authority is derived (*a*) by virtue of a GENERAL power and (*b*) by virtue of a specific power contained in the act of incorporation of the railway company.

In the case of Koontz *vs.* District of Columbia, 32 Washington Law Reporter, 390, the District of Columbia had allowed a certain structure to remain in close proximity to the railway tracks, and a passenger riding upon the footboard of one of the cars was injured by such obstruction. Held that the question of the defendant's negligence and of the plaintiff's contributory negligence was for the jury, and that the verdict for the defendant was improperly rendered.

In this case the court says:

"The question of the right of the municipal corporation of the District to construct the sewer, and of the right to contract for the execution of the work, though to occupy the bed of the public streets, can admit of no doubt. The opening and construction of the sewer in this case was done under and by an express authority of Congress. *But this authority did not excuse the municipal government from the duty of exercising due and reasonable care in the execution of the authority conferred by Congress.*"

In Roth *vs.* The District of Columbia, 16th Appeal D. C., 335, the court, in commenting upon the duties of the District of Columbia, says:

"The performance of their public duties does not require the perpetration of a nuisance by them. On the contrary, the abatement of nuisances is part of their duty, and part of the duty of the municipality; and we would regard it as an absurdity to assume that their public duties could not be performed without the commission of a nuisance."

In the case of Harbison *vs.* The Met. R. R. Co. (an action to recover damages for personal injuries), 9 App. Cas., 60, in speaking of the proximity of the parallel tracks of the railway company, the court said:

"It cannot be said, as matter of law, that the tracks were too close together for ordinary safety. Having been located according to the act of Congress, and subject to the approval of the authorities charged with the control of the streets and the regulation of their use, the presumption would lie, in the absence of proof to the contrary, that they were at a safe distance apart.

"It must be borne in mind, too, that there was no proof whatever that there had been an increase in the width of cars since the construction of the tracks, or that either of the cars in question was of an extraordinary or unusual width as compared with those that had been customarily used.

"We think the doctrine a reasonable one, and agree with the court of appeals of New York in saying in a case much like this: 'The defendant was not bound to so construct its

tracks that it would be impossible for a passenger to be struck by another car while he was standing on the outside of an open car' (Craighead *v.* B. C. R. Co., 123 N. Y., 391, 395)."

In the case at bar the plaintiff's intestate was not standing on the running-board of the car, but was seated in a seat provided by the railway company for the comfort and convenience of passengers, and that the south-bound car passed the north-bound car within the distance of the length of one's finger, and had done so daily for a period of six or eight months prior to the accident, when the unusually large, open or summer cars were substituted for the smaller cars formerly used on said tracks. The question in this case is, Was there anything in this state of facts to advise the District authorities that the public safety was imperiled; and did the District have the power and was it charged with the duty to compel the railroad company to remove the danger?

III.

CONSTRUCTIVE NOTICE TO A MUNICIPAL CORPORATION OF A DEFECT IN ITS HIGHWAYS.

In the case of Russell *vs.* The Town of Columbia, 74 Mo., 481, it was held that when an injury comes to a person not in fault by some act done by a municipality itself, or by some private person in the occupation or use of a public highway, under the authority of the municipality, it is liable *without notice.*

This ruling has been followed in the District of Columbia in a number of cases.

In D. C. *vs.* Woodbury, 136 U. S., 430, Mr. Justice Harlan said:

"The District authorities, within the scope of their opportunities and money, being under an obligation to exercise a general supervision of the streets, and to keep themselves

informed about their condition, if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing the fact, and did not know it because they failed to exercise proper diligence, then the law imputes notice to them; in other words, they have notice in contemplation of law, and that is constructive notice."

This statement was quoted and relied upon in District of Columbia *vs.* Boswell (6 D. C. App., 402). Here a young child at play tripped over the edge of a gas box which protruded slightly above the level of the sidewalk, causing him serious injury. Testimony was introduced showing that one witness had noticed the condition of the gas box and had himself stumbled over it. Held that the District had constructive notice of the dangerous condition of the sidewalk and was liable for injuries resulting therefrom in the absence of contributory negligence.

In D. of C. *vs.* Payne, 13 D. C. App., 500, the plaintiff fell through a broken sewer top and sustained injuries. The defense of lack of notice was set up. Speaking of the duty of the municipality to inspect, the court says:

"If that duty was neglected and the injury complained of was directly attributable to that neglect of duty, then the defendant was liable. But as the basis of the action is negligence, notice to the corporation of the defect which caused the injury or facts from which notice may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability."

Dillon on Mun. Corps., vol. 2, par. 1025, says:

"The corporation, in the absence of controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known *or ought to have been known to it or to its officers having authority to act in respect to it.*"

District of Columbia Reports, volume 18, Corts *vs.* The District of Columbia, page 289:

Mr. Justice Cox, in delivering the opinion of the court, referred with approval to the case of Prince George's County *vs.* Burgess, 61 Md., 31. In that case the court, speaking of the danger in question, which was a hole in the floor of a bridge, said:

"The simple fact of its existence, with the knowledge of the plaintiff, was not sufficient to bar recovery. It should appear that the hole rendered the bridge practically impassable to effect a bar because of knowledge. The hole might possibly have been avoided with ordinary care in driving; and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff and naturally would have induced care on his part; but the *onus* of showing that such care and prudence were *not* exercised still rested on the defendants."

At page 294, in the Corts case, *supra*, the court, continuing, says:

"If the jury find from the evidence that at the place of the accident described in the declaration there was a defect in the sidewalk resulting from the omission of the defendant to keep the same in repair, which was either dangerous in itself or obviously calculated to endanger the safety of people passing over it when covered with ice or snow, such as ordinarily accumulated and might be expected at the season when the accident happened, and when in the condition in which it was at the time of the accident, and was in fact unsafe at the time in question, and the accident complained of resulted from such unsafe condition; and they further find that the defect in the sidewalk had continued so long that the defendant knew, or ought to have known it, then the plaintiff is entitled to recover unless she herself was guilty of negligence in not using ordinary or reasonable care to guard against the accident, or as explained in instructions 10 and 12, given at the instance of the defendant; unless such negligence on the part of the plaintiff appears from the evidence offered on her behalf, the burden of proving same rests upon the defendant."

In the case of Kavanaugh *vs.* The City of Janesville, 24 Wis., 619, which was an action to recover for injuries sustained by reason of a defect in the sidewalk, the court says:

"Nor do we think there is any ground for saying that she was guilty of negligence because she attempted to pass along the walk, then well knowing its dangerous condition. She was passing along with due caution, as we must assume after the verdict of the jury, one of the public streets of the city, which was defective and out of repair. She had passed there many times before safely, notwithstanding its dangerous condition and because she attempted to do so again we are asked to hold as a matter of law, that she was guilty of negligence, that directly contributed to the injury. This we cannot do."

This case was followed by Wheeler *vs.* Town of Westport, 30 Wis., 392, where an injury was sustained owing to a defect in the highway, of which the plaintiff had knowledge. Judge Dixon closes a very lengthy and able opinion on this question, reviewing many authorities sustaining the verdict in the court below, saying:

"In the present case we cannot say as matter of law that the plaintiff in passing along the road was bound at all times by day or night to bear in mind and think of the obstruction, although he knew it was there."

This has been the uniform ruling in the courts of Wisconsin (Townley *vs.* C., M. & St. P. R. R. Co., 53 Wis., 626; Spensley *vs.* Lancashire Ins. Co., *Id.*, 433; Labotta *vs.* St. Paul T. & M. Ins. Co., 54 *Id.*, 687; Hill *vs.* Fond du Lac, 56 *Id.*, 242; Johnson *vs.* C. & N. W. R. R. Co., 56 *Id.*, 274; Nelson *vs.* C., M. & St. P. R. R. Co., 60 *Id.*, 320; Kaples *vs.* Orth, 61 *Id.*, 531; Hoye *vs.* C. & N. W. R. R. Co., 60 *Id.*, 666, and same case again before the court and reported in 67 Wis.).

The courts in Massachusetts have always held this to be the law (Reed *vs.* Northfield, 13 Pick., 94; Smith *vs.* Lowell, 6 Allen, 39; Snow *vs.* Housatonic R. R. Co., 8 *Id.*, 441–450; Frost *vs.* Waltham, 12 *Id.*, 85; Fox *vs.* Lackett, 10 *Id.*, 535;

Mahoney *vs.* Metropolitan R. R. Co., 104 Mass, 73; Lyman *vs.* Amherst, 107 Mass., 339, and numerous other cases).

In Pennsylvania :

Plaintiff was injured by the fall of a bridge over which he was passing, which he knew to be defective; *held* that he could recover (Humphreys *vs.* Armstrong Co., 36 Pa. St., 204).

In Missouri :

Plaintiff knew the street was dangerous when he entered upon it.

The court say :

"The fact that a person injured through a defect in a highway or street had previous knowledge of the defect is not conclusive evidence of knowledge on his part. It is a fact to be submitted with other evidence to the jury (Smith *vs.* The City of St. Joseph, 45 Mo., 449").

In Iowa :

The plaintiff stepped down a perpendicular declivity in the sidewalk, which he knew to be there; the court say, if the doctrine of knowledge of the defect is to excuse the city from liability, "all, then, that a city needs to do to escape its obligations to keep its sidewalks and streets in repair would be to notify its inhabitants that the streets and sidewalks are in an unsafe condition." (Rice *vs.* City of Des Moines, 40 Iowa, 638.)

In New Hampshire :

The courts hold that the question of reasonable or ordinary care, in view of plaintiff's knowledge of defect in road, should be submitted to jury (Griffin *vs.* Auburn, N. H., 121).

In Minnesota :

It is held that the question of knowledge is for the jury (Erd *vs.* The City of St. Paul, 22 Minn., 443).

In Illinois:

The plaintiff stepped into a hole in the sidewalk which was covered with snow, and, although she knew of the defect, the court held her entitled to recover (City of Aurora *vs.* Dale, 90 Ill., 46).

In Connecticut:

The same doctrine is held (Dooley *vs.* The City of Meriden, 44 Conn., 118).

In Indiana:

It is held that previous knowledge of the defective condition of a turnpike will not alone prevent the plaintiff from recovering (The Henry Co. Turnpike *vs.* Jackson, 86 Ind., 111).

In Vermont:

The plaintiff drove his horse and cutter into a cradle hole covered by a snow drift. He had known it had been there for three weeks. Court held plaintiff could recover notwithstanding he knew the defect (Coates *vs.* Canaan, 51 Vt., 131; Montgomery *vs.* Night, 72 Ala., 411; Pomfrey *vs.* Saratoga, 104 N. Y., 459; Noble *vs.* Richmond, 31 Gratt., 271; Baltimore *vs.* Holmes, 39 Md., 243).

Same rule prevails in England (Clayards *vs.* Dethick, 12 Q. B. Rep., 439).

In the case of Dahlberg *vs.* Minneapolis Lt. R. R. Co., 50 Com. Rep., 585, it is said:

A passenger in the act of taking a seat rested his hand on and partially over the base of an open window, where it was immediately struck and injured by an upright sewer plank standing in close proximity to a passing car. It was held that the question of contributing negligence was for the jury and that the finding should not be disturbed; thus in

Summers *vs.* Crescent City R. Co., 34 La. Ann., 139 (44 Am. Rep., 419):

The plaintiff while riding rested his arm on the sill of an open window and allowed his elbow to project a few inches; another car of the same company coming down the track, as it passed by struck his arm and broke it, the intervening space between the two cars at that particular point of the road being so narrow as to cause the accident. It was held that the company as a carrier of passengers should have taken proper precautions to prevent such accidents and that plaintiff could not be considered guilty of contributory negligence. (Compare Voorhees *v.* Kings County El R. Co., 21 N. Y. Supp., 775, where passenger's hand was injured by falling window.)

To the effect—

See also Spencer *vs.* Milwaukee R. Co., 17 Wis., 508; Chicago and Alton R. Co. *vs.* Pondram, 51 Ill., 333; Miller *vs.* St. Louis R. Co., 5 Mo. App., 477; Winters *vs.* Hahn and St. Jo R. Co., 39 Missouri Rep., 475.

In the case of Francis *vs.* N. Y. Steam Co., 114 N. Y., 380, it is said:

"Defendant opened a trench parallel with and about 20 inches south of the south rail of the south track of the Sixth Avenue Lt. Ry. Co., in Vesey street. This trench was three or four feet deep, six feet wide, its sides were sheathed with plank to prevent the earth from caving in. The defendant laid one or two planks across this trench, which formed the floor of what is called, in this litigation, a bridge. On June 15th, 1883, the plaintiff was sitting on the right or south side of a Sixth Avenue car which was going east in Vesey street, and as the car passed the so-called bridge his arm came in contact with one of the uprights and was broken between the elbow and shoulder. The plaintiff testified that he sat by the car window reading a paper and that his arm was entirely within the window."

"The court charged that if the jury found that if the plaintiff sat with his arm out of the open window, and it was so brought in contact with the upright and broken, it would

not defeat his right to recover unless they further found that such conduct was negligent."

"Defendant excepted to this charge."

"The court said 'The courts of Massachusetts and Pennsylvania have held that it is negligent, as a matter of law, for a railway passenger to ride with his arm extending through the window and that no recovery can be had for an injury received by reason of the arm being in that position. But in Dahling *v.* St. Ry. Co., 32 Minn., 404, it was held that whether a passenger upon a street car was negligent in riding with his arm out of the window was a question of fact."

"We are of the opinion that the evidence contained in the record would not have justified the court in charging as a matter of law, that if the plaintiff's arm projected through the window, and beyond the outer edge of the car, he could not recover."

"Judgment affirmed."

The case of Germantown Pass. Ry. Co. *vs.* Brophy, 105 Pa. St., 38, appears to be a suit by John Brophy against the Germantown Passenger Railway Company to recover damages for personal injuries sustained by the plaintiff while riding in a passenger car on the defendant's street railway, caused, as alleged, by the negligence of defendant's servants. Plea not guilty. Facts in evidence: On September 19th, 1881, plaintiff was passenger on car of defendant. At corner of 25th and Girard Ave., the double tracks of the defendant company in turning the corner approach so near each other that two cars going in opposite directions cannot pass each other at a certain point without danger of striking or rubbing. The car in which plaintiff was riding was going westward and while turning the curve a car on the other track going eastward, collided with it whereby the plaintiff's arm was seriously injured.

"Testimony conflicting as to whether plaintiff's elbow was outside or inside the window.

"The company has two railway tracks separated by so narrow a space on a curve that when its cars were passing in different directions they came in collision, whereby the defendant in error, one of the passengers, was injured. He testified that while the windows were open they stuck up about two inches, and he had his arm against the top of the

window sash, and inside of both windows, and that the collision threw his arm out of the window.

"The judge charged that if he sat with his arm out of the window when the collision occurred, he was guilty of negligence and could not recover.

"It cannot be declared negligence in law for a passenger to so rest his arm and the jury has found it is not negligence in fact."

From the foregoing authorities it is apparent that the District of Columbia had the power, and was consequently charged with the duty, to supervise the construction of the tracks of the railway company, and also to see that the cars used thereon were consistent with public safety. It is also apparent that the defendant, The District of Columbia, had notice of the dangerous proximity with which these cars passed each other. The undisputed evidence shows that the parallel tracks were unusually close together, and that the cars were of unusual width, and passed each other at a distance imminently and manifestly dangerous, which condition prevailed for a period of six to eight months prior to the accident, and which, under the circumstances of the case, could have been observed by any pedestrian in the street, by the exercise of the most casual observance, which question, it is submitted, should have been left to the jury.

It is therefore submitted that under the facts and circumstances of this case, as supported by the authorities above quoted, the District of Columbia is liable for the damages growing out of the death of the plaintiff's intestate.

Respectfully submitted.

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Henry W. Blodgett

Court of Appeals, District of Columbia.

OCTOBER TERM, 1904.

No. 1413.

ELIZABETH P. SMITH, ADMINISTRATRIX OF THE ESTATE OF PETER A. SMITH, DECEASED, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

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vs.

THE DISTRICT OF COLUMBIA.

ARGUMENT FOR APPELLEE.

This was an action on the case against the Georgetown and Tennallytown Railroad Company and the District of Columbia for personal injuries resulting in the death of Peter A. Smith.

THE ALLEGED MUNICIPAL DUTIES AS SET UP IN THE DECLARATION.

The plaintiff's amended declaration contained two counts. By the first count (2), after setting up the grant of administration to her upon the estate of the deceased, the plaintiff alleged that the Georgetown and Tennallytown Railway

Company was duly incorporated with authority to construct and lay down double or single tracks of railway along and upon High (32d) street; that pursuant to said act of incorporation and under the control and direction of the defendant, The District of Columbia, the said railway company constructed a double line of tracks on 32d (High) street, the inner rails of the said tracks being laid down at a distance of three feet and seven inches apart, all of which was subject to the approval, control, and direction of the defendant, The District of Columbia; that on July 1, 1901, and for a long time prior thereto the railway company was and still is a common carrier for hire, and as such constructed, owned, operated, maintained, and controlled a line of street railway and owned and operated cars which were and are propelled along said tracks of railway by means of electricity; that it was the duty of the said railway company to carefully construct and maintain its said parallel tracks at a safe and proper distance from each other and to otherwise construct the said tracks so as to avoid all possible danger to its passengers;

"that by virtue of the said act of incorporation of the defendant railway company, as well as the general duties imposed by law upon the said defendant, The District of Columbia, it was at the time aforesaid, and still is, the duty of the said defendant, The District of Columbia, to require the said defendant railway company to carefully, properly and safely construct its said line of tracks at a proper, safe and lawful distance from each other, so that the cars passing each other on said parallel tracks might pass in a manner safe and secure to passengers, and it was the further duty of the said defendant, The District of Columbia, to require the said railway company to use and employ all reasonable and possible

means and methods so that all passengers riding on said cars might be free from danger;"

that on July 1, 1901, in the night time, the plaintiff's intestate was a passenger on one of the cars of the railway company; that he boarded said car at 32d street near M street northwest, which car thereafter proceeded in a northerly direction along said 32d street; that it was the duty of the said railway company to safely carry plaintiff's intestate to his destination, and to that end to construct and maintain safe and suitable tracks so that cars, while being operated thereon, might pass each other in a manner safe and secure to passengers;

"and it was the duty of the defendant, The District of Columbia, to require its codefendant, the said railway company, to provide all safe and suitable appliances in the construction of the tracks of said railway company on said 32d street, northwest, at or near Prospect avenue, at such safe, proper and lawful distances from each other, so that all passengers riding in cars upon said tracks might be free from danger;"

that the said railway company, notwithstanding its duty in the premises, so negligently, improperly and in utter violation of its said duties, carelessly, negligently, and improperly constructed its said tracks on said 32d street near Prospect avenue by placing the inner rails of said double or parallel tracks unlawfully, unnecessarily, and dangerously close together, to wit, about the distance of three feet and seven inches, and maintained and used said tracks so improperly and negligently constructed;

"that the defendant, The District of Columbia, notwithstanding its duty in the said premises, so negligently, carelessly, unlawfully and improperly and in utter violation of the duties imposed upon it by law, knowingly, unlawfully, injuriously, and negligently permitted and suffered the said railway company to carelessly and negligently construct its tracks on said 32d street, northwest, near Prospect avenue, by placing the said inner rails of said double tracks dangerously and unnecessarily close together, as aforesaid and knowingly, unlawfully, injuriously and negligently suffered and permitted the said railway company to maintain and use said tracks, as aforesaid, so improperly and negligently constructed for a long time, about the period, to wit, five years; that by reason of said neglect and default by said defendants, their agents and employees in said premises on the day and year last aforesaid, on 32d street northwest, at or near Prospect avenue,"

while seated in a car of the railway company, without negligence on the part of plaintiff's intestate, and by reason of the wrongful acts and neglect and default of the said defendants, their agents and employees, the plaintiff's intestate was struck by one of the cars of the railway company going south and passing the car in which he was seated; that he was violently thrown from his seat and fatally injured.

The second count of the declaration (5) is identical with the first, except that it charges that it was the duty of the railway company to provide safe and suitable cars upon said tracks with due regard to the public safety, so that all passengers riding in or upon said cars might be free from danger, and

"that it was the duty of the defendant, The District of Columbia, to require the said railway company to select, use

and operate suitable cars for operation in the District of Columbia so that said cars while passing in opposite directions upon said tracks, might pass each other at a safe, proper and lawful distance and in a manner safe and secure to the plaintiff's intestate." * * * "That the defendant, The District of Columbia, knowingly, so carelessly, improperly, negligently and unlawfully suffered and permitted the said railway company to negligently, carelessly, improperly and unlawfully manage, control, use and operate, wide-open or summer cars, so large and unsuitable that said cars, while passing in opposite directions on said parallel tracks, came within dangerous and unnecessary proximity to each other, to-wit; the distance of about three inches,"

and that by reason of the neglect and default of the defendants the plaintiff's intestate was fatally injured, &c.

THE CHARTER OF THE G. & T. RAILWAY COMPANY.

The act of Congress to incorporate the Georgetown and Tennallytown Railway Company (Rec., 15), enacted August 10, 1888, authorized the railway company "to construct and lay down a single or double track railway, with necessary switches, turn outs, and other mechanical devices for operating the same by cable or electric power, for carrying passengers in the District of Columbia from the Potomac river, near High street, to and along High street, in Georgetown, to the Tennallytown road, but wholly outside the limits of said road, and along the side of the said road to the District line; also the privilege of laying such conduits beneath the surface of Water street for the purpose of conveying or communicating power from any suitable point along said

Water street to said High street, as may be found necessary and subject to the approval of the Commissioners of the District of Columbia." * * * "Said railway shall be constructed of good materials and in a substantial manner, with rails of the most approved pattern, the gage to correspond with that of other city railroads, all to be approved by the Commissioners of the District of Columbia" * * * (17). "It shall also be lawful for said corporation, its successors, or assigns, to erect and maintain, at such convenient and suitable points along the line as may seem most desirable to the board of directors of said corporation, and subject to the approval of the Commissioners of the District, an engine house or houses, boiler-house, and other buildings necessary for the successful operation of such cable or electric road" * * * (18). 'The said company shall place first-class cars on said railways with all modern improvements for the convenience and comfort of passengers, and shall run cars thereon as often as the public convenience may require. And according to a published schedule to be filed with the District Commissioners, and be approved by them." * * * (19). "Said company shall have at all times the free and uninterrupted use of the railway."

By act of Congress approved March 24, 1890 (20), the charter of this railway company was amended "by substituting after the words 'and along High street, in Georgetown, to the Tennallytown road' the words 'and thence along and in said roads' for the words 'but wholly outside of the limits of said road and along the side of said way:' *Provided*, That the inner line of rails shall be at the minimum distance of eight feet from the center of the improved roadway: *And provided further*, That said railway shall be located on such

side of the roadway as may be indicated by the Commissioners of the District of Columbia."

By act of Congress approved July 14, 1892 (20), the charter of said railway company was further amended, the last amendment being a congressional recoguition of the tracks upon High street then located as they were and have continued to be to the present time.

It appears that at the point of the accident the distance between the inner rails of the tracks was three feet and seven inches, and that from the time of the construction of the tracks until about eight months prior to the accident small cars were used thereon; that about six or eight months before the accident these cars were replaced by larger cars, which in passing each other came within a distance of two and one-half inches of touching; that the plaintiff's intestate was a passenger upon a north-bound car; he was sitting on the west side thereof, resting his arm or elbow upon the rod or guard rail of the car; that the car upon which he was riding passed another car going in an opposite direction; that while the cars were passing there was a swaying motion which caused them to almost touch one another, and while the cars were passing the upright posts of the south-bound car struck the elbow of deceased and dragged him from the car and threw him in the street and caused his death. There was no evidence that there had ever been a similar collision or accident.

The trial court directed a verdict in favor of the District of Columbia, and the present appeal is from the judgment entered accordingly.

There was a verdict and judgment for $9,000 (11) against

the railway company, and an appeal from that judgment is now pending here.

APPELLANT'S CLAIM OF MUNICIPAL LEGAL DUTY IS UNFOUNDED.

The claim of the appellant is that the Commissioners have general power, and in the case of this company special power to regulate the construction and maintenance of its tracks and the selection and operation of its cars used thereon, and that the power thus vested in the Commissioners is mandatory, imposing an absolute duty; and because such power was not efficiently exercised by the Commissioners the municipality is liable in damages for the injuries which caused the death of the plaintiff's intestate.

The grant to this company was not a municipal grant; it was a private congressional grant, made upon such terms and conditions as Congress saw fit to impose. The municipality was not the author of the franchises of the company. It was utterly without power to allow such a use of the public streets; and the municipality could neither abridge nor terminate the privileges granted to the company by Congress.

Congress saw fit in this case to designate the Commissioners of the District of Columbia as its agents to approve the original location and construction of the railway, and subsequently, by its act of July 14, 1892 (20), gave legislative sanction and approval thereto.

The authority of the Commissioners to "approve" necessarily involved the exercise of judgment and discretion (Monroe *vs.* U. S., 184 U. S., 524).

This was not a ministerial but a judicial function to be exercised by them as individuals. The Commissioners are not the municipality.

"The sum of the municipal powers of the District of Columbia are neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials."

District of Columbia *vs.* Bailey, 171 U. S., 176.

Congress from time to time has clothed other Federal officials with similar authority of approval in the case of private grants of franchises in this District.

The construction of the roads of the Washington and Georgetown railroad, the Columbia railroad, and the Metropolitan railroad was in each case to be approved by the Secretary of the Interior (Compiled Street Railway Laws, 48, 71, and 122).

The Metropolitan railroad in 1892 was required to repair the bridge across Rock creek under direction of the Engineer Commissioner D. C. and in accordance with plans and specifications prepared by him (*Ibid.*, 141).

The Commissioners are authorized to construct water mains, but the Secretary of War only controls the supply of water.

The gas company is required to lay gas mains, but the superintendent of gas, a Federal officer, tests the gas and meters.

There is no provision in the charter of the Georgetown

and Tennallytown railroad respecting the width of the space between its tracks.

What this court said in District of Columbia *vs.* Sullivan (11 App. D. C., 537) in reference to the laying of the tracks of this company is applicable to this case, viz:

"We must assume that the railway was laid and constructed in accordance with the authority derived from Congress and the approval of the Commissioners of the District of Columbia. There is no evidence in the case to show to the contrary."

As to the construction and equipment there is here "no evidence to the contrary," and, of course, the same presumption must prevail.

The Commissioners, therefore, fully performed whatever duty was imposed upon them by Congress as its agents as a condition to the exercise by this company of its franchise as a railway company.

The authority here was not given to the municipality; it was given to the Commissioners specifically. It was a "superadded obligation" laid on them. As this court said in McGraw *vs.* D. C. (3 App. D. C., 408):

"And even if it should be assumed that there was a duty imposed by it, (the act of Congress) from which a liability might accrue, it is not at all clear that the District of Columbia is chargeable with that duty, which was laid by express terms, not on the District as a municipality, but upon the Commissioners of the District as a superadded obligation.

"In a doubtful case, the recovery ought not to pass against the municipality. It is only where there is a plain and

obvious neglect of duty on the part of the municipal agents that liability can arise in such cases as the present."

Dist. of Col. *vs.* Moulton, 15 App. D. C., 374.

THERE IS NO CONTROL GIVEN THE COMMISSIONERS OVER THE CARS AND OTHER EQUIPMENT OF THIS ROAD.

The Commissioners have coveted the possession of such authority; they consider that the public safety, health, and comfort would be best secured if they were authorized to regulate the weight of the cars and to require them to be in a clean and proper condition, properly heated and protected by emergency brakes, etc., as well as run on proper time schedules, etc., and they have now pending before Congress a bill (S. 4106, 58th Cong., 2d sess.) to clothe them with the necessary authority.

Congress has at least twice considered it necessary to legislate on the subject of the cars of street railways: In 1892, (p. 141), when enlarging the time for changing the motive power of the Metropolitan railroad, whose charter expressly provided "that the use and maintenance of the said road shall be subject to the municipal regulations of the city of Washington within its corporate limits," Congress declared that pending the change the road should be put and kept and maintained in good condition, subject to the penalty of a fine to be recovered by the Commissioners. And in 1894 (p. 142) the same company was required to cease to use on its lines running east and west each and every closed car that had been in use for three years and to substitute new cars of most approved pattern, subject to the penalty of a fine to be recovered by the Commissioners.

THERE IS NO LIABILITY IN THE PERFORMANCE OF PUBLIC OR GOVERNMENTAL FUNCTIONS.

When power conferred has relation to public purposes and for the public good, it is to be classified as *governmental* in its nature and appertains to the corporation in its political capacity; but when it relates to the accomplishment of private purposes in which the public is only indirectly concerned, it is private in its nature and the municipality in respect to its exercise is regarded as a legal individual. In the former case the corporation is exempt from all liability, whether from non-user or misuser, while in the latter case it may be held to that degree of responsibility which would attach to an ordinary corporation.

1st Smith's Mod. Mun. Corp., § 780.
Springfield, &c., Ins. Co. *vs.* Village of Keeseville, 148 N. Y., 46.
Davidson *vs.* Mayor, &c., 54 N. Y. S., 51.
Miller *vs.* City of Minneapolis, 75 Minn., 131.
Irvine *vs.* City of Chattanooga, 101 Tenn., 291.
Bartlett *vs.* Town of Clarksburg, 45 W. Va., 393.
Snyder *vs.* City of Lexington, 20 Ky. L., 1562.

Official action is judicial when it is the result of judgment or discretion, and ministerial when it is absolute, certain, and imperative, involving merely the execution of a set work, and when the laws which impose it prescribe the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.

1st Smith's Mod. Mun. Corp., § 782.
Edgerly *vs.* Concord, 62 N. H. 8.,
Thompson, Neg., 731–734.
Maximilian *vs.* N. Y., 62 N. Y., 160.
Williams, Mun. Liability for Torts, § 17.

In Mead *vs.* New Haven, 40 Conn., 72 (1873), the defendant corporation was held not liable for the negligent acts of a boiler inspector, on the ground that it had no pecuniary, or individual, or private interest in the inspection of boilers. The court says:

"Although the power of the city over the subject is conferred by the charter and not by general law, yet the city must, we think, be regarded as the agents of the Government, and acting for the State and not for itself in making the appointment of inspectors."

The general rule is well settled that municipal corporations are not liable for failing to exercise governmental and discretionary powers, and for this reason we think that such corporations are not ordinarily liable for failing to exercise their power to remove or abate a nuisance, unless they are made responsible therefor by statute or the particular nuisance is one in which they are interested or over which they have control in what may be termed their individual capacity as distinguished from that of a governmental instrumentality.

Elliott, Roads and Streets, 2d ed., 706.
Hill *vs.* Boston, 122 Mass., 344.
Oliver *vs.* Worcester, 102 Mass., 489.
Griffin *vs.* Mayor, 9 N. Y., 456, 459, 461.
Cain *vs.* Syracuse, 95 N. Y., 83.
Davis *vs.* Montgomery, 51 Ala., 139.
Hewison *vs.* New Haven, 37 Conn., 475.
Kiley *vs.* Kansas City, 87 Mo., 103.
City of Anderson *vs.* East, 117 Ind., 126.
Kistner *vs.* Indianapolis, 100 Ind., 210.
City of Greenville *vs.* Britton, 19 Tex. App., 79.
Butz *vs.* Cavenaugh, 137 Mo., 503.

The rule is thus declared by the Supreme Court:

"It is not, however, upon any such ground that the defendants attempt to sustain the instruction, but they insist that, being a municipal corporation, created by an act of Congress, they are invested with the power over the bridge merely as agents of the public, from public considerations and for public purposes exclusively, and they are not responsible for the nonfeasances or misfeasances of the persons necessarily employed by them to accomplish the object for which the power was granted. *Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen*, and for many other useful and important objects within the scope of their charters. *Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty.* But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, *where a specific and clearly defined duty is enjoined in consideration of the privileges* and immunities which the act of incorporation confers and secures."

Weightman *vs.* Washington, 1 Black, 39–53.

A MUNICIPAL CORPORATION IS NOT LIABLE EITHER FOR THE NON-EXERCISE OF OR THE MANNER IN WHICH, IN GOOD FAITH, IT EXERCISES DISCRETIONARY POWERS OF A PUBLIC OR LEGISLATIVE CHARACTER.

The District of Columbia is not liable for failure of the Commissioners to enact regulations or ordinances, or when enacted to enforce them, or enforce the laws within its jurisdiction, as, for example, forbidding the unlawful use of the streets, as by coasting, or prohibiting swine or cattle from running at large, or neglecting to prevent the erection of wooden buildings within certain limits, in accordance with charter provisions, or failing to exercise power to supply water and apparatus for extinguishing fires, or the power to enforce ordinances forbidding the use of fireworks. So there is no liability for failure of firemen to use proper efforts in preventing the spread of fire, or for the negligent construction, maintenance, or use of appliances forthe extinguishment of fire. So, as a general rule, failure to enforce ordinance providing for the abatement of nuisances creates no municipal liability to private action.

McQuillin, Municipal Ordinances, sec. 436 and cases cited.

Fowle *vs.* Alexandria, 3 Peters (U. S.), 398.

Collins *vs.* Savannah, 77 Ga., 745.

Forsyth *vs.* Atlanta, 45 Ga., 152.

Odell *vs.* Schroeder, 58 Ill., 353.

Wheeler *vs.* Plymouth, 116 Ind., 158.

Arnold *vs.* Stanford (Ky., 1902), 69 S. W. Rep., 726.

Dudley *vs.* Flemingsburg, 60 L. R. A., 575.

Jones *vs.* City of Williamsburg, 47 L. R. A., 294.

McDade *vs.* Chester City, 117 Pa., 414.

Batham *vs.* Phila., 196 Pa., 302.

In Fowle *vs.* Alexandria, 3 Pet., 398, the common council of Alexandria had granted a license to carry on business as an auctioneer, but omitted to take a bond, as required by the State law, and loss resulted therefrom. It was held that the action of the city in adopting the ordinance for licensing auctioneers was a legislative act and the exercise of a right of sovereignty primarily belonging to the State, but delegated to the city, and for errors of judgment in the exercise of such powers the municipality was not liable in its corporate capacity.

A railroad company was required by an ordinance to fence its roadway; power to pass such an ordinance was conferred by a law of the State authorizing the city to require railroad companies to provide protection against injury to persons and property in the use of such railroads; the company failed to erect a fence and an injury resulted to a deaf and dumb child; the railroad company claimed that the city had not fixed the height of the fence to be created; but the court said:

"The right of the council was to give specific directions if it saw proper and to supervise the work when done, if necessary, but it was matter of discretion, and they were not required to act in the first instance, nor at all, if they were satisfied with the work as executed by the railroad company."

Hayes *vs.* Mich. Cen. R. R., 111 U. S., 242.

As was said by the court of appeals of Virginia, reviewing all the authorities (January, 1900):

"The peace, good order, and welfare of a community is a primary object of Government, and laws are enacted by the sovereign power, and ordinances adopted by municipal

corporations, for the preservation thereof; but clearly neither the State, nor the municipality, would be liable for an injury received in an affray upon one of its streets, or in a collision from fast riding or driving in consequence of the absence of a law or ordinance prohibiting the same, or the failure of the authorities of the State or city to enforce it, if enacted or adopted, although but for the want of a proper law or ordinance or the failure to enforce the same, the injury would not have happened. The Government does not guarantee its citizens against all the casualties incident to humanity, and cannot be called upon to compensate, by way of damages, its liability to protect against such accidents and misfortunes. The failure to pass a needful law or ordinance is plainly the omission by the State or city as an agency thereof of a public, governmental duty, for which no action lies. Hence upon this principle it has been held by the courts and laid down by approved text-writers, that a municipal corporation, in the absence of an express statutory declaration to the contrary, is not liable for failing to pass an ordinance prohibiting the firing of cannon or fire-arms in its streets, or the explosion of fire-works, or the engaging in dangerous sports, or the running at large of cattle and swine, or for suspending or neglecting to enforce an ordinance against such dangerous practices and improper use of its streets, in consequence whereof private property was destroyed or persons injured."

Elliott, Roads and Streets, 465.
2 Dill., Mun. Corp., 4th ed., 949, note.
1 Shearm. & Redf., Neg., 5th ed., 262.
Cooley, Const. Lim., 6th ed., note to page 254.
Cooley, Torts, 2d ed., 739, and numerous cases cited.

"But not being the act of the city it is the act of those who actually set up and maintain the pesthouse. It was thus a private nuisance, of the same legal character that the establishment of a slaughter-house by individuals might be.

It is admittedly true that the city could, by ordinance and prosecution, so punish perpetrators of nuisances within its jurisdiction as to prevent them. For a failure to enact and execute such ordinances will the city be liable? We are of the opinion that it will not. It would be a failure to discharge its political duties, for which it is not liable to a suit at law.

Patch *vs.* City of Covington, 17 B. Mon., 722.
Wheeler *vs.* City of Cincinnati, 19 Ohio St., 19.
Rivers *vs.* City Council of Augusta, 65 Ga., 376.
Davis *vs.* City of Montgomery, 51 Ala., 139.
Dill., Mun. Corp., §§ 950, 951.

In Rivers *vs.* City Council of Augusta, 65 Ga., 376, the city council had passed an ordinance forbidding cattle running at large in the streets, but subsequently suspended it. During the suspension the plaintiff was gored by a cow running at large in the streets. It was held that the city was not liable for a failure to enact and enforce an ordinance on the subject of cattle running at large within its corporate limits. The matter was held to be one of governmental discretion. In Davis *vs.* City of Montgomery, 51 Ala., 139; 23 Amer. R., 545, a house was destroyed by fire set by sparks from an engine, which was, by ordinance, a nuisance, subject to abatement, but which the city had neglected to abate. It was held that the plaintiff could not maintain an action against the city for its failure to take steps to abate nuisances within its limits, unless, perhaps, it had appeared that the corporation had acted corruptly, and abused its powers."

Arnold *vs.* Stanford (Ky.), 69 S. W., 726, 1902.

In the cases arising out of the recent disastrous fire in the Iroquois theater it was held "that no action could be maintained against the city of Chicago either upon the grounds that the theater, the scene of the plaintiff's injuries

was a public nuisance, or that the city was liable for such injuries because of the dereliction of its officers in licensing the theater before it had complied with the ordinances of the city in relation to its construction, or installing of fire apparatus, or the furnishing of egress insufficient in numbers for the safe exit of its patrons in the case of fire."

Gibson *vs.* Chicago, Chicago Legal News, July 9, 1904, p. 387.

Somewhat similar to the case at bar is Fitch *vs.* Mayor of N. Y. City, 55 New York Superior Ct., 494.

A street railway operating with one-horse cars had at one of its termini where one of the street-car tracks crossed another a turn-table; the cars would be run on this turn-table and by means of it be turned around; the turn-table was so placed as that a passenger alighting from the car would step immediately on the sidewalk, and as that in so turning the car around the rear platform would move over the sidewalk of one of the streets, overreaching a distance of two or three feet. The plaintiff, a passenger on one of the cars of the railroad, on arriving at the said termini, had alighted on the sidewalk, when the car was so negligently turned that the platform struck her before she could move to a safe distance. She was knocked down and received severe injuries. It was held that the city was not liable: First, whatever power or duty the city had or it was under as to obstructions and encroachments on the sidewalks applied equally to the street railway, and it appearing that the railway company has a right to a turn-table somewhere at that point, and to which right the city was forced to yield, its proper authorities had a discretion as to

where the turn-table should be placed, which discretion was of a judicial nature, the exercise of which was not reviewable by a court; and, second, the accident did not happen because the place where the plaintiff alighted was a sidewalk; it would have happened if the turn-table had been so far from the curb that the plaintiff would have stopped on the streetway.

A municipal corporation is not liable for injury to a person who is struck by a bicycle ridden by another person on a sidewalk by reason of the failure to enact or enforce an ordinance prohibiting the riding of bicycles on sidewalks.

Jones *vs.* City of Williamsburg, 47 L. R. A., 294.

A city exercises its police power in clearing an alley of weeds, so that it is not responsible for negligence in the performance of the work by one whom it has employed for that purpose which results in the injury of a child attracted there by its operations.

McFadden *vs.* Jewell, 60 L. R. A., 401.

A municipal corporation is not liable for injuries caused by failure to prevent coasting on its streets, since the duty of preventing such conduct rests on the officers as servants of the States.

Dudley *vs.* Flemingsburg, 60 L. R. A., 575.

In Harmon *vs.* St. Louis (137 Mo., 494, 1896) it was held that the city was not liable to a property-owner for its failure to prevent the erection of a wooden building on an adjoining lot in violation of the city ordinance; that if the city was so held to be liable it would also be "liable for the

neglect to enforce any of its police, health, and general welfare ordinances, thus becoming a gigantic insurance corporation for all its citizens or those coming within its limits against all the casualties incident to humanity or civil society."

In City of Greenville *vs.* Britton (19 Tex. App., 79, 1898) the court held that although the city had under a statute full control over its streets it was not liable for damages done to a building by the negligent use of water at a water station erected in the street because of its failure to exercise the power conferred upon it to abate the station as a nuisance. The court said :

"Even if the city had given a license to the person who erected the water station, it would not be liable for the reason that the damage to appellee did not necessarily result from the use of the street for the water station, but grew, as alleged by appellee, out of the negligent use of the water station by the man who erected it. * * * If the city was responsible for the erection of the water station, it was not responsible for the carlessness of the person using it, because there was no kind of connection or relation existing between them."

In Griffin *vs.* N. Y. (9 N. Y., 456), an action for damages caused by obstructions of building material in the street, it was held, there was municipal liability for a street out of repair and for obstructions with notice. In this case the court said : "The wrong complained of arose either for the want of suitable municipal regulations or because of the negligence in the city officers in ascertaining the existence of the obstructions and seasonably applying the proper remedy, but the doctrine which would hold the city pecuniarily

liable in such a case would oblige its treasury to make good to every citizen any loss which he might sustain for the want of adequate laws upon every subject of municipal jurisdiction, and on account of every failure in the perfect and infallible execution of those laws. There is no authority for such a doctrine, and we are satisfied that it does not exist. * * * The obligation to legislate and to prevent and remove nuisances is an imperfect obligation and for its non-performance an action will not lie at the suit of any individual who may sustain injury by the omission."

In Cain *vs.* Syracuse (95 N. Y., 83) it was held that the power given in the city charter to pass ordinances for demolishing buildings which by reason of fire may become dangerous was simply one of local legislation, and the failure to exercise it did not render the city liable, the power being discretionary and judicial. Finch, J., said (91):

"We must consider the nature and scope of the duty, and in so doing must not be misled by the test which makes permissive words absolute and a command. That test is applicable only to solve a doubt and to determine between a ministerial and a judicial duty when such duty may belong to either class, but will not serve to make a duty which is inherently and inevitably discretionary, nevertheless ministerial because the public have an interest in its exercise or the rights of individuals may be affected by it (18 Wis., 85). The test is useful in a doubtful case, but cannot change the nature of the power when finally ascertained."

So it is held that where the right to demand the exercise of a public function by an officer depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed.

Carr *vs.* N. Liberties, 35 Pa., 330.

Lehigh Co. *vs.* Hoffort, 116 Pa., 119.

Because the duties of the municipal authorities of the District in adopting a general plan of drainage are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, no liability arises by reason of the insufficient drainage of a particular lot.

Johnson *vs.* D. C., 118 U. S., 19.

Because in the exercise of the authority to change the grade of the streets judgment and discretion was required to be exercised by the agents of the public, resulting injury to an abutting property owner was held to be *damnum absque injuria.* The court said:

"Having performed this trust, confided to them by law, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public—they have not acted 'unlawfully or wrongfully' as charged in the declaration."

Smith *vs.* Washington, 20 How., 135.

Speaking of the general powers of supervision and control by the Commissioners of the construction, &c., of the Washington, Alexandria and Mt. Vernon railroad under its charter, this court said:

"*The powers and duties of these executive officers are also, in a measure, legislative and judicial, for they are called upon to exercise judgment and discretion in the enactment and enforcement of rules and regulations in aid of the objects and duties aforesaid.* * * * A general regulation of construction of the kind would seem to be impracticable, under all the circumstances to be taken into consideration, and the public safety can, apparently, be more efficiently and justly provided for by the requirement that all such constructions

shall first be submitted to the Commissioners for consideration and approval, and if permitted, carried on under their immediate supervision."

"The city grants authority, a mere license under sanction of the legislature for the construction of railroads in the streets, but does not become guarantor for all damages to abutting owners. The railroad is not its work nor performing as officer or agent of the city the function incumbent on it, whether an ordinary or street passenger railroad."

Jordon *vs.* Benwood, 42 W. Va., 312.

On a siding or where there is a railroad crossing, cars may come into collision if there is negligence in their movements. Such tracks are so located that cars will necessarily collide unless they are moved with care, but that does not constitute negligence in the location of the tracks. So in the case at bar there was no possibility of damage from the location of the tracks under any circumstances, unless the railroad company ran its cars so that they would not pass at this point, and negligently so ran them.

The police regulations which were offered in evidence (14) relate, first, to the movement and speed of cars, which the Commissioners were expressly authorized to regulate by the tenth paragraph of the act of Congress approved January 26, 1887 (1st Supplt. R. S., 523), and, second, the fenders on street cars, as to them express authority was given by the act of Congress approved August 7, 1894 (2d Supplt. R. S., 230), "to make and to enforce all reasonable regulations in respect to requiring street cars operated by other means than horse-power in the District of Columbia to be provided with proper fenders for the protection of lives and limbs of all persons within the District of Columbia. Such power and

authority shall extend to the adoption by the said Commissioners of any fender or fenders deemed by them to be superior to the fenders now in use as the fender or fenders which shall be used on cars operated within the said District: *Provided*, That nothing contained in this act shall operate to relieve any street railway company from liability for accidents on its lines."

In Roth *vs.* District of Columbia (16 App. D. C., 323) it was held that the municipality was liable for creating or permitting a nuisance upon its own property, although such property was used exclusively for police purposes. In our brief in that case there is a collection of cases establishing the non-liability of municipal corporations in respect of the negligent performance of general or police duties.

In B. & O. R. R. *vs.* Dist. of Col. (10 App. D. C., 111) the court sustained the police regulations requiring steam railroad trains to be stopped before crossing the tracks of other railroads, but the question there involved related to the movement of the cars on the streets and it had nothing to do with the regulation and control of the equipment of the roads, their rolling stock, the kind of cars, &c.

Liability is alleged because the District of Columbia neglected to abate a common nuisance. The fact of the existence of such a nuisance must first be ascertained in some way, after which some officer must be duly authorized to act.

Suppose the Commissioners had acted on this case, and after due deliberation had found that it was not a nuisance and had decided not to interfere; the fact that such a conclusion might be reached proves their power to be discretionary, and therefore their mistake is not the subject of an

action at law. As well might the court be sued for a mistake in its discretion as a municipal corporation for errors of judgment in its officers.

Discretionary power must be confined to the tribunal in which it is reposed. There can be no appeal from the exercise of a discretion. The law has already supplied the means of ample redress in all cases of public or private nuisances. The citizen can sue in the common-law courts for any actual injury and recover damages from the person maintaining the nuisance. If he fears future injury he can enjoin the continuance of the nuisance by appeal to a court of equity. If the nuisance be a public one, any citizen can cause the perpetrator to be indicted and have the nuisance abated.

The duty of the municipality to keep the streets and sidewalks in a reasonably safe condition of repair is a ministerial duty, and for the neglect of that duty it may be held liable for an injury resulting therefrom, but the injury complained of in this case did not result from any want of repair or defective condition of 32d (High) street.

The condition of a highway, however, is one thing and the manner of its use by the public is quite a different thing.

There are many obstructions in the sidewalk and roadway of the streets of the city which are not unlawful, although not expressly authorized by act of Congress.

Howes *vs.* D. C., 2 App. D. C., 188.
Dist. of Col. *vs.* Ashton, 14 App. D. C., 577.
Swart *vs.* D. C., 17 App. D. C., 407.
Wolf *vs.* D. C., 21 App. D. C., 464.
Dist. of Col. *vs.* Moulton, 182 U. S., 576.

"That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes."

Northern T. Co. *vs.* Chicago, 9 U. S., 635.

In the case at bar there was no such legal duty imposed upon either the District of Columbia or the Commissioners of the District as is alleged in the plaintiff's declaration. The argument assumes that such duties rest upon the Commissioners, and then confounds the Commissioners with the municipality, declaring their legal identity.

NO ACT OR NEGLECT OF THIS DEFENDANT WAS THE PROXIMATE CAUSE OF THE INJURIES TO THE PLAINTIFF'S INTESTATE.

Finally, even if the case at bar had been one that presented a defective condition of the street, a want of repair, and there was otherwise liability on the part of the District, in order to recover the plaintiff must show that such negligent defect was the sole cause of the injury. For where the injury follows from a defect united with some distinct efficient cause, without which it would not have happened, there can be no recovery.

Swart *vs.* D. C., 17 App. D. C., 414.
Rowell *vs.* Lowell, 7 Gray, 100.
Kidder *vs.* Dunstable, 7 Gray, 104.
Lyons *vs.* Brookline, 119 Mass., 491.
Pratt *vs.* Weymouth, 147 Mass., 245.

It is not enough that the supposed defect in the way may have contributed indirectly to the accident, but the injury must be produced directly by the alleged defect, and this must appear to have been the sole cause of the injury.

Farnum *vs.* Concord, 2 N. H., 392, 394.

Neither the failure of the Commissioners to require a relocation of the tracks nor their acquiescence in an improper location of the tracks nor their failure to prevent the running of the larger cars on the tracks was the proximate cause of the injury in this case. These matters were but conditions—they were not causes; there was an intervening efficient cause producing the injury. The plaintiff's intestate was injured either because of his own negligent act or because of the negligent act of the railway company in the movement of its cars at the place of the accident. There was no notice whatever, express or constructive, to the Commissioners or the municipality of any possibility of danger at the place of the accident by reason of the proximity of the tracks or the running of the large cars or that such cars theretofore ever had swayed or that they had a tendency to sway when passing, and there was no proof that any accident had previously occurred by reason thereof.

It is respectfully submitted that the court below did not err in directing a verdict for the District of Columbia, and the judgment appealed from should, therefore, be affirmed.

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